IN THE FAIR WORK COMMISSION

TITLE OF MATTER:	**Application by Metropolitan Fire & Emergency Services Board**
SECTION:	**s.225 - Application for termination of an enterprise agreement after its nominal expiry date**
SUBJECT:	**Application for termination of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010 & Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010**
MATTER NUMBER:	**AG2014/5121**

SUBMISSIONS OF THE METROPOLITAN FIRE & EMERGENCY SERVICES BOARD

1 Introduction

On 28 March 2014, the MFB made application under s.225 of the FW Act to terminate the Operational Staff Agreement and the ACFO Agreement. Extensive evidence was heard and filed from 7 to 25 July 2014. Appendix A sets out the MFB witnesses, their positions, the exhibit numbers of their statements and the transcript pages on which their oral testimony appears.

The MFB makes these submissions, based on that evidence, in support of the application.

To assist the Commission, Part 2 includes a glossary of commonly used terms.

Further, the Commission has been given evidence of a variety of events over recent years, which, the MFB submits, go in large part to the statutory tests set out in s.226. Rather than including all the details of those events in the body of the Submission (although some of the matters are referred to therein), the details of a number of these circumstances are included in Appendices D to FF. Although evidence has been led on

Lodged by: The Applicant

Address for service:
CORRS CHAMBERS WESTGARTH
Lawyers
Bourke Place
600 Bourke Street
MELBOURNE VIC 3000
AUSTRALIA

Telephone: (03) 9672 3000
Facsimile: (03) 9672 3010
Email: john.tuck@corrs.com.au
Ref:JT/HR

many other relevant examples as well, time constraints have limited the extent to which these could be addressed in Submissions.

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3 Glossary

2005 Agreement – Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2005, tab 3 MFB-3

2010 Agreements - The ACFO Agreement and the Operational Staff Agreement, together

ACFO Agreement - *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010*

CFA Agreement - *Country Fire Authority/United Firefighters' Union of Australia Operational Staff Enterprise Agreement 2010*

CFA Case - *United Firefighters Union of Australia v Country Fire Authority [2014] FCA 17*

Commission - Fair Work Commission or its predecessors as applicable

Consultative Committee – the MFB/UFU Consultative Committee established under clause 13 of the Operational Staff Agreement and clause 8 of the ACFO Agreement, and which are the same body in accordance with the governing Terms of Reference (annexure PS-3 to the first statement of Paul Stacchino MFB-18, p43)

EBIC – the Enterprise Bargaining Implementation Committee, being the predecessor to the Consultative Committee, including under clause 9 of the 2005 Agreement.

EM Act – *Emergency Management Act 2013* (Vic)

FW Act - *Fair Work Act 2009* (Cth)

Lewis Report - *Report on the Processes to select New Personal Protective Clothing for Firefighters*, Judge Gordon Lewis, February 2008 (Statement of Youssef, MFB-14, Annexure DAY-44)

MFB - Metropolitan Fire and Emergency Services Board

MFB Act - *Metropolitan Fire Brigades Act 1958* (Vic)

Modern Award – *Firefighting Industry Award 2010* (Cth)

OHS Act - *Occupational Health and Safety Act 2004* (Vic)

Operational Staff Agreement - *Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010*

Re AEU - *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188

UFU - United Firefighters' Union of Australia

WR Act – *Workplace Relations Act 1996* (Cth)

4 Metropolitan Fire and Emergency Services Board

4.1 The MFB is a statutory authority constituted under the MFB Act. Section 7 provides:

> *(1) The functions of the Board are*
>
> *(a) to provide for fire suppression and fire prevention services in the metropolitan district; and*
>
> *(b) to provide for emergency prevention and response services in the metropolitan district; and*
>
> *(c) to carry out any other functions conferred on the Board by or under this Act or the regulations or any other Act or any regulations under that Act.*
>
> *(2) The Board has all powers necessary to carry out its functions.*
>
> *(3) The functions of the Board extend to any vessel berthed adjacent to land which by virtue of section 4(2) is part of the metropolitan district.*

4.2 It is important to note that the MFB is now not just concerned with matters in the Metropolitan District. Following the passing of the *Emergency Services Legislation Amendment Act 2012* (Vic), the MFB Act was amended to include section 7AA which provides as follows:

> *(1) In addition to any other of its duties and functions under this Act, the Board must assist in the response to any major emergency occurring within Victoria.*
>
> *(2) In this section:*
>
> ***emergency agency means**:*
>
> *(a) the Board;*

(b) *the Country Fire Authority established under the Country Fire Authority Act 1958;*

(c) *the Secretary to the Department of Sustainability and Environment when performing functions or duties or exercising powers under section 62(2) of the Forests Act 1958;*

(d) *the Victoria State Emergency Service Authority established under the* ***Victoria State Emergency Service Act 2005****;*

major emergency means

(e) *a large or complex emergency (however caused) which;*

(i) *has the potential to cause or is causing loss of life and extensive damage to property, infrastructure or the environment; or*

(ii) *has the potential to have or is having significant adverse consequences for the Victorian community or a part of the Victorian community; or*

(iii) *requires the involvement of 2 or more emergency agencies to respond to the emergency; or*

(b) *a major fire within the meaning of the* ***Emergency Management Act 2013****.*

4.3 In addition, section 7A of the MFB Act provides as follows:

7A Objective

The objective of the Board in performing its functions and exercising its powers under this Act is to—

(a) *contribute to a whole of sector approach to emergency management;*

(b) *promote a culture within the emergency management sector of community focus, interoperability and public value.*

4.4 There is to be a Chief Officer appointed under the MFB Act who has broad powers under the Act and Regulations made thereunder to make decisions consistent with the functions of the Board and the purposes of the legislation (see e.g ss 31A, 32, 32AA, 32B, 32C and Regulation 11 dealing with any general orders to be considered desirable). That Chief Officer at present is Peter Rau, the first witness in the proceedings.

4.5 To meet the purposes set out in the MFB Act, the Board has been given various powers.

These include section 25B as follows:

> ***Employees of Board***
>
> *(1) The Board may from time to time;*
>
> *(a) employ any persons that it considers necessary to assist it in carrying out its functions under this Act or any other Act; and*
>
> *(b) transfer, promote, suspend or remove any employee.*
>
> *(2) Every appointment or promotion of a member of the operational staff is to be on 3 months' probation.*

4.6 The MFB has been held to be a trading corporation within s.51(xx) of the Constitution and a constitutional corporation under the WR Act.[1] Further, the MFB is an agency of the State of Victoria.[2]

4.7 The above has the following consequences:

(a) The FW Act operates in respect of the MFB and its employees which means, inter alia, the bargaining regime, rights to take industrial action and agreement making provisions apply;

(b) The application of the FW Act above is subject to the Melbourne Corporation principle[3] which was applied to Federal Industrial laws and awards in Re AEU[4]. This prohibits Federal laws impairing the State's capacity to function as a Government.

5 Emergency Management Act 2013 (EM Act)

5.1 Significant changes have been made to emergency management governance structures which were foreshadowed in the Victorian Government's Victorian Emergency Management Reform White Paper released in December 2012.[5] The new arrangements have been made to 'support collaboration and interoperability across the emergency management sector to....improve the integration and effectiveness of the planning and preparation for, response to, and recovery from, emergencies in Victoria'.

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[1] *UFU v MFESB* (1999) 83 FCR 346
[2] *UFU v CFA* [2014] FCA 17
[3] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31
[4] *Australian Education Union*; ex parte Victoria (1995) 184 CLR 188
[5] Ex MFB 2 Tab 4

5.2 The EM Act, in operation from 1 July 2014, inter alia, makes the Emergency Management Commissioner responsible for the overall response to major emergencies, including management of the consequences of the emergency.

5.3 Under that Act and consequential amendments to the MFB Act, the EM Commissioner can make directions in respect of fires in the State.[6] It is simply not the case, as some of the UFU witnesses believed, that there can be focus only on the Metropolitan District when assessing the demands that may be made on the MFB. Importantly, the EM Act makes provision for the involvement of the CFA, the Department of Environment and Primary Industries and the Victorian State Emergency Services Authority in dealing with emergencies in Victoria.

Application of s 226 FW Act: Contrariness to Public Interest

6 Statutory Framework

6.1 Section 226 of the FW Act provides as follows:

When the FWC must terminate an enterprise agreement

If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:

(a) the FWC is satisfied that it is not contrary to the public interest to do so; and

(b) the FWC considers that it is appropriate to terminate the agreement taking into account all the circumstances including:

(i) the views of the employees, each employer, and each employee organisation (if any), covered by the agreement; and

(ii) the circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.

6.2 It is important the words of the section are applied. Extra words or requirements should not be read into the application of the section.

6.3 As a Full Bench of the Commission said in *NTEIU v Monash University* (2013) FWCFB 5982 at [19]:

In taking this approach, we consider with respect that his Honour erred. It is a trite but nonetheless fundamental proposition that the duty of the Commission is to apply the Act, and it is the Act which states the applicable law. There is a danger inherent in using synonyms, paraphrases and re-formulations of statutory language found in previous decisions or extrinsic materials in lieu of the language of the legislation itself, as the High Court recently warned in Baini v The Queen:

'As the Court said in Fleming v The Queen, '[t]he fundamental point is that close attention must be paid to the language' of the relevant provision because

[6] Any directions given or steps taken in performance of the functions of the EM Commissioner which involve the Chief Officer would be complied with consistent with the EM Act and the MFB Act. Neither Act contains relevant specific penal sanctions.

'[t]here is no substitute for giving attention to the precise terms' in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute.'

7 Section 226 (a) - Contrariness to Public Interest

7.1 Applying the words of this paragraph, it is clear:

(a) the Commission does not have to be satisfied that termination is in the public interest;

(b) if there is no public interest in a matter raised by the termination of the agreements then that matter, however affected, does not go into a consideration of such contrariness.

7.2 The provisions of s.226(a) are essentially the same as were contained in s.170MH(3) of the preceding legislation. There is Full Bench authority as to such provisions. There is no Full Bench authority as to the operation of s.226.

7.3 In *Kellogg Brown & Root Pty Ltd v Esso Australia Pty Ltd* ('**KBR**') [2005] AIRC 72 [139 IR 34), there was an application under s.170MH to terminate an agreement binding on employees who worked on a week about roster on Bass Strait oil rigs. There had been bargaining in which the employer had sought to change the roster. The employer was contracted to Esso who also wanted such a change. The employees (and their unions) strongly resisted such a change raising a variety of health and safety and family responsibility concerns and the influence of Esso in the bargaining. The Full Bench found termination was not contrary to the public interest and granted the application.

7.4 Guidance as to the meaning of the public interest in this context can be derived from KBR:

'[23] The notion of the public interest refers to matters that might affect the public as a whole such as the achievement or otherwise of the various objects of the [Workplace Relations] Act, employment levels, inflation, and the maintenance of proper industrial standards An example of something in the last category may be a case in which there was no applicable award and the termination of the agreement would lead to an absence of award coverage for the employees. While the content of the notion of public interest cannot be precisely defined, it is distinct in nature from the interests of the parties. And although the public interest and the interest of the parties may be simultaneously affected, that fact does not lessen the distinction between them.

...

[27] It should be emphasised that the Commission's consideration of the public interest for the purposes of...[the forerunner of section 226]...is directed to the consequences of terminating the agreement. In a given case, some consequences will be clearly predictable, others

will be less so. For the most part the Commission should be guided by the likely foreseeable consequences of termination rather than speculation about possible consequences.'

7.5 The Commission has considered whether various matters are in the public interest or not in the context of termination applications. Matters considered have been:

(a) effect on parties to the agreement;

(b) the statutory scheme for the making and observance of agreements;

(c) conduct and progress in bargaining;

(d) the need to ensure the efficient and viable operation of the enterprise;

(e) the problems relating to the continued operation of the agreement;

(f) provisions of the agreement dealing with its renewal and/or termination. [7]

7.6 The Commission has to be cautious in respect of such checklists which mix up components of private interests and 'the public interest'. KBR has dealt with many of these matters. For completeness, those matters are dealt with below.

8 General Effect of Termination

8.1 Termination of an agreement may have a number of consequences. It is important that the Commission assess the effects of termination on the basis of what is likely to occur, rather than speculating on possible consequences.

8.2 Termination may remove obligations on the employer (or employees) which may affect the public interest in a positive or negative way.

8.3 In its primary Submissions (UFU-5) at [33], the UFU asserts that 'the removal of the consultation provision will not enhance productivity and performance of the statutory functions'.

8.4 Further, the UFU submits at [34] that ' a foreseeable consequence of the removal of the consultation provisions is impaired organisation performance due to.....':

(a) an undermining of faith, trust and confidence in the organisation;

(b) increased staffing uncertainty prejudicing managers ability to plan and know the entitlements to apply;

(c) an impaired capacity on the part of incident controllers to deploy resources quickly and efficiently;

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[7] *Kellogg Brown and Root v Esso Australia* (2005) 139 IR 34; *Energy Resources of Australia Ltd v Liquor, Hospitality and Miscellaneous Union* [2010] FWA 2434; *Tahmoor Coal Pty Ltd* (2010) 204 IR 243; Mr Thorley Operations (1999) Print S0542

(d) conferral on senior officers of the discretions to make their own, subjective assessment of risk and to alter staffing upon unknown criteria which will impair safety;

(e) a potential for passive opposition from firefighters.

8.5 The UFU's Submission was made before the giving of the undertaking by the MFB and prior to the evidence of the Chief Officer and other MFB witnesses. Further, the effects of removal of the consultation provisions are dealt with in detail later in this Submission under the appropriateness consideration.

8.6 However, in respect of such assertions:

(a) It is a serious assertion that the MFB, charged with the statutory responsibility of providing emergency and fire services to the Victorian community is going to act against the public interest or threaten the safety of firefighters;

(b) Such an assertion, strongly contested, cannot be founded on speculation and exaggeration;

(c) On a proper analysis of all the evidence, not only is the argument wrong but the termination of the 2010 Agreements will actually be of benefit to the broader community – it will be in the public interest. As noted above, that a matter may be in the public interest does not make it a consideration under s.226(a). The effect on the employer and other parties and the community should however be considered under s.226(b). It is accordingly dealt with in this Submission under the 'appropriateness' consideration.

9 Effect on parties of termination

9.1 This is now an explicit consideration in s.226(b). It is accordingly dealt with under that heading in this Submission. However, the UFU, in its primary Submissions has said that given the emergency services work done by firefighters 'there is accordingly a strong public interest in ensuring fair terms and conditions that reflect and support the nature of this unique employment'.[8] The UFU relies on the *Public Administration Act 2004* (Vic) and section 8 thereof which requires 'public sector employees are treated fairly and reasonably'. It is said termination 'would cast most firefighters back to the inferior minimum award conditions in the Modern Award'. It is also said that Commanders and ACFOs are not covered by the Modern Award.

9.2 As to the above, firstly, there is no reason why terminating an agreement containing over-award conditions results in employees being treated unfairly or unreasonably.

[8] At [31]

9.3 The immediate legal effect would be that the majority of employees would fall back to coverage by the Modern Award. In KBR, a similar situation prevailed. This would almost inevitably happen in the current industrial environment, in existence when the FW Act was passed.

9.4 As the Full Bench said at [46] of the decision in KBR:

> *'It may safely be assumed that the termination of a certified agreement, carrying with it the loss of significant benefits, is not itself contrary to the public interest. That is evident from the terms of s.170MH(3). Bearing in mind the material before the Commissioner, we think it is clear that the effect of termination upon the wages and other conditions of the contractors' employees does not have any implications for the public interest. The Commissioner was of a similar mind.'*

9.5 It is not contrary to the public interest to reduce the legal obligations in respect of employee entitlements to Award conditions.

9.6 In KBR, the contactors undertook to maintain employees' wages for one month while negotiations continued. After that time, if agreement had not been reached, the contactors proposed a scheme of remuneration involving maintenance of the roster but a reduction in earnings of something around 10%.

9.7 In the present matter, there are comprehensive undertakings, operating on top of the Modern Award, which ensure fairness and reasonableness to all employees, not only to those covered by the Modern Award. In the period of the undertaking, assuming no agreement is reached, the UFU and employees have all their options open to them, including taking industrial action to put pressure on the MFB to achieve their goals.

9.8 Further, the current termination provisions in the FW Act expressly make this matter a consideration. This is dealt with further later in these Submissions.

9.9 As noted, the above also addresses the position of ACFOs and Commanders. In the circumstances of Commanders, there is a Commanders Award which covers Commanders who were appointed as Inspectors. This is currently being modernised by the Commission.

10 The statutory scheme for the making and observance of agreements

10.1 The termination provisions come within the parts of the FW Act dealing with the making and observance of agreements. The desirability of reaching an agreement is recognised in these sections. However, the fact that agreement was in the past reached is irrelevant to the public interest – absent agreement in the past, there would obviously be no agreement to terminate.

10.2 The UFU submitted at [35] that 'it is not in the public interest to 'terminate the entire agreement where some terms are 'problematic'.... where the impugned terms were freely entered into by the MFB as part of the statutory bargaining processes...'. It may be in the public interest that terms and conditions are agreed by parties at the workplace. However the fact that terms were once agreed and incorporated in an agreement, cannot operate as a significant factor against termination.[9]

10.3 The legislative scheme does not contemplate:

(a) agreements continuing forever.[10]

(b) the terms of agreements being factors which mitigate against the considerations that go to termination.

10.4 That agreement was reached in the past cannot be a reason to conclude that termination is against the public interest.

10.5 The evidence as to the making of the agreements is as follows:

(a) the MFB proposed a log of claims which removed various obligations concerning staffing, consultation, requirements for agreement on various matters and dispute procedures;[11]

(b) that log was resisted by the UFU;[12]

(c) bargaining went on for a long time;[13]

(d) the CEO at the time, Mr Fountain, directed that an agreement be reached.[14]

10.6 It is of little assistance to speculate why this occurred. It may have been:

(a) a hopeful belief that things would improve;

(b) a concern about industrial action;

(c) political involvement as speculated by Mr Walker.[15]

Ultimately, there is no assistance to be gained from such speculation. Whatever were the factors then, they do not exist now.

10.7 When dealing with the content of existing agreements, the UFU submits at [37] the impugned Re AEU clauses do not provide a proper basis for termination 'because they are of no legal effect'. As to this:

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[9] See *Energy Resources Australia v LHMU* [2010] 2434 at [26]; *Rio Tinto Coal Australia Pty Limited T/A Blair Athol Coal Project* [2013] FWCA 2248 at [36]
[10] Also see *Energy Resources Australia v LHMU* [2010] 2434 at [26]
[11] Transcript PN5101, MFB-43
[12] See for example Brown at PN5923-5928
[13] Walker, Transcript PN5239
[14] Walker, Transcript PN5241-5244
[15] See MFB-44 at pp36-7

(a) It is against the public interest to have many significant provisions in an agreement that have no legal effect;

(b) Whilst they may have no legal effect (and that is a matter for Court), they have real and practical operation. They are enforced by the UFU and complied with, at present, by the MFB.

11 Conduct and progress in bargaining

11.1 In their primary Submissions, the UFU made comment about the bargaining conduct of the MFB. **Appendix B contains a detailed analysis of the bargaining between the parties.**

11.2 At [35] of KBR, it was said:

> *Before leaving this part of the decision it is opportune to comment on the submission advanced by some of the appellants that the conduct of a party in bargaining is not a relevant consideration in the exercise of discretion required by s.170MH(3). This proposition must be rejected as too wide. There may be circumstances in which unconscionable conduct by a party in connection with the renegotiation of an agreement touches the public interest and should be taken into account. This, however, is not such a case.*

11.3 Indeed, in another Full Bench decision, *Tristar Steering v AWU* [2007] AIRCFB 506, the conduct of the employer was not to bargain at all. Such conduct was, in the circumstances, not found to be contrary to the public interest.

11.4 Demands made in bargaining by employers (or unions) are sometimes suggested to form a public interest consideration. As was said in KBR:

> *The 14 Day Roster Claim*
>
> *[36] We turn now to the second, discrete ground for the Commissioner's decision, namely: that it would be contrary to the public interest to facilitate the contractors' pursuit of the 14 day roster claim by terminating the agreements.*
>
> *[47] While appreciating the Commissioner's concern that termination would facilitate the contractors' pursuit of the 14 day roster, it seems to us that in the circumstance no true public interest issue arose. There was no necessary causal connection between the termination of the agreements and the imposition upon the offshore employees of the 14 day roster. The scheme of the Act contemplates the parties taking industrial action as part of the enterprise bargaining process. In relation to Division 2 agreements, protected action, as identified in s.170ML, may be taken in support of agreements of the kind identified in s.170LI: Electrolux Home Products Pty Limited v The Australian Workers' Union and Others. The only limitation on the subject matter of the proposed agreement is that it should be about matters pertaining to the relationship between the relevant employer and its employees. In relation to Division 3 agreements, protected action may be taken in furtherance of negotiations for agreements of the kind identified in ss.170LO and 170LP. The limitation on the*

subject matter of the proposed agreement is relevantly the same as that in s.170LI because of the definition of industrial dispute in s.4. The Act stipulates the requirements for an agreement to be certified and the matters which will prevent it from being certified. Given these provisions, the Commission should be slow to censor the subject-matter of bargaining by exercising the discretion in s.170MH(3). That discretion should be exercised in harmony with the freedom to bargain and to take protected action in the course of bargaining which Part VIB permits.'

11.5 In the present circumstances:

(a) bargaining has been prolonged and difficult with agreement very unlikely in the foreseeable future;

(b) whilst the MFB is critical of the conduct of the UFU and its Officers in bargaining, it is not in this proceeding asserting 'unconscionable conduct'.

11.6 The fact that bargaining may be continuing does not mean it is contrary to the public interest to terminate an agreement. That was the case in KBR. This is further clear from:

(a) the good faith bargaining requirements in the FW Act require that once bargaining has commenced (as here), parties must meet and exchange positions (see s.229);

(b) the FW Act makes no suggestion that bargaining has to have ceased or be non-existent for the termination power to be exercised. Such a requirement cannot be read into the Act.

12 Bargaining position of the MFB

12.1 The MFB takes the position that:

> '... the MFB will not, under any circumstances, concede to replacement enterprise agreements that contain any of the following terms:
>
> (A) A consultation provision which contains a requirement that decisions can only be made by agreement/consensus between the parties.
>
> (B) A consultation provision that requires consultation on all or any change.
>
> (C) A dispute resolution clause which applies to all matters pertaining to the employment relationship.
>
> (D) A dispute resolution clause which requires the MFB to maintain the 'status quo' in place prior to any grievance arising.
>
> (E) Provisions that restrict external recruitment.

(F) Provisions that restrict and/or impede operational deployment across the MD and the State more generally.

(G) Provisions that are more appropriately addressed through Victorian State legislation, e.g. OH&S Act, MFB Act etc.

(H) Provisions that prevent the MFB from determining and acting when an employee is not fit for duty.

(I) Provisions that defer bargaining as a reserve matter, to be dealt with during the life of the agreement, or are constructed in a manner that keeps bargaining live during the life of the agreement.

(J) Provisions which are not permitted to be included in an enterprise agreement by law.'[16]

12.2 As to threshold issues, the MFB takes the position that:

'(A) Consultation. The MFB will not concede to a consultation provision which contains a requirement that decisions can only be made by agreement/consensus between the parties, or that requires consultation on all or any change.

(B) Dispute resolution. The MFB will not concede to a dispute resolution clause which applies to all matters pertaining to the employment relationship, and which requires the MFB to maintain the 'status quo' in place prior to any grievance arising.

(C) Classifications in the context of external recruitment.

It has been, and continues to be the MFB's position that these matters are fundamental to any new agreement. The MFB will not be in a position to reach an agreement with its employees about the range of other matters on which the parties remain apart unless these matters are agreed to by the UFU. The MFB has stated on a number of occasions that it sees little utility in deferring discussions about these matters to later in the bargaining process.'[17]

12.3 This above positions have been decided on at the highest levels of the MFB.

'The key content of the enterprise agreements proposed by the MFB, including certain matters which they cannot contain, has been decided upon and approved in conjunction with the MFB Board, including the MFB President, Neil Comrie, and the MFB Chief Executive Officer, Jim Higgins.'[18]

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[16] Stacchino reply MFB-19 at [11]
[17] Stacchino reply MFB-19 at [16]-[17]
[18] Rau reply MFB-8 at [61]

12.4 The UFU submits at [39] that 'key bargaining topics, such as rates of pay, have not yet been discussed'. Many topics have not been discussed. Whilst pay may (or may not be) important in this bargaining (and only Mr Lee raises it as a consideration in bargaining in all the evidence called by the UFU), the key bargaining issues are that the UFU wants to maintain the substance of the main obligations regarding consultation, agreement requirements, dispute procedures and the various Re AEU prescriptions and the MFB wants them gone.

12.5 It is within the UFU's rights to oppose that. However, that the MFB takes this position does not evidence bargaining that is in not in good faith.

12.6 That the MFB has described matters as threshold issues and is committed to ensuring their exclusion from any new agreement, does not evidence unconscionable conduct, nor bargaining otherwise than in good faith. The MFB cannot be compelled to bargain about matters that cannot form part of an agreement in any event.

12.7 The good faith bargaining requirements in s.228 have not been contravened, nor has the UFU ever sought bargaining orders against the MFB. There is no requirement to make concessions or agree on terms to be included in the agreements as s.228(2) provides. As some of the authorities make clear:

(a) parties cannot be required to meet until agreement is reached as there is no compulsion for agreement making in the FW Act (see *TWU v Resource Management* [2010] FWA 8765 at [14]);

(b) firmly maintaining a negotiating position does not breach good faith bargaining obligations; (see *LHMWU v Hall Aged Care* [2010] FWA 1065).

12.8 Further, the position of the MFB can hardly be said to be capricious or unreasonable. Given the experience of the MFB with all the above matters, it is hardly surprising that it does not want to include them in any future agreements.

12.9 The UFU suggests at [41] of its primary Submissions that the 'true reason for this application'……' is an attempt (on the part of the MFB) to achieve its desired bargaining outcome without going through the prescribed bargaining …..'. It also asserts at [44] that the refusal to bargain about *Re AEU* matters 'is confected by the MFB to assist its application in the present case'. This is:

(a) a suggestion against the evidence of Mr Rau and Mr Stacchino;

(b) a suggestion that was never put to any of the MFB witnesses involved in bargaining;

(c) an assertion not based on any evidence.

13 Bargaining position of the UFU

13.1 It is clear that the UFU wants to retain the substance of all it currently has in the 2010 Agreements.

13.2 The most recent position it has advanced on 6 May 2014, on careful analysis, is about form rather than substance.

13.3 On 6 May 2014, the UFU provided a new log of claims to the MFB. This was said by Mr Lee at [124] to be 'intended to address the objections the MFB had identified to the UFU's earlier log of claims, by reference to the principles in Re AEU... and to address the MFBs concerns continue (sic) discussions between the parties'. That document is Annexure PS 57 to the First Stacchino statement, MFB-18.

13.4 The MFB responded in detail to this by letter and table of 6 June 2014 (Annexure PS 3 to the second Stacchino statement MFB-19 at [308]).

13.5 It is clear that this new log maintains the substance of all the claims made in the first log. Without going to each and every claim (and each is responded to by the MFB):

13.6 Lateral entry

(a) Although under the revised classifications clause[19] the requirement for prior service with the MFB has been removed from some classification levels (namely Firefighter Level 1, Leading Firefighter, Leading Firefighter (Safety Officer), Senior Leading Firefighter, Station Officer, Senior Station Officer), the disincentive to transfer to the MFB is retained by the following features:

(i) paypoint progression through each of the 4 paypoints at each of these classification levels other than Firefighter Level 1, requires 12 months service with the MFB at each paypoint;

(ii) before being able to carry out duties at the classification entry level, a lateral hire would be required to complete all MFB training modules for each lower classification (for example, a senior Commander at the CFA would be paid at the lowest MFB Commander paypoint and, prior to being able to perform the duties of Commander, would need to complete successfully all MFB Firefighter levels 1, 2 and 3 modules, all MFB Qualified Firefighter modules, all MFB LFF modules, Command and control modules, all MFB Station Officer modules, all MFB Senior Station Officer modules, all MFB Commander modules and the MFB orientation program);

(iii) Firefighters levels 2 and 3 and qualified firefighters all continue to require minimum periods of service with the MFB, namely 12, 24 and 36 months respectively;

[19] First statement of Stacchino MFB-18, pp 948 – 958

(iv) The time it would take for a lateral hire to complete each of the various modules is unclear, however:

(A) Firefighters eligible to complete the Leading Firefighter modules will, on completion of such modules, be given the opportunity to complete the command and control module within 6 months (cl 12.4.2);

(B) Priority among existing employees (which would include lateral hires, who are initially appointed to the relevant classification and only subsequently are required to complete the various modules) to undertake the command and control module will be in order of the date Leading Firefighter qualifications were completed, commencing with the earliest qualified employees (ie which would clearly not be those who had just transferred from another organisation) (cl 12.4.3);

(C) An employee (which would also include those who transferred from other organisations) who has undertaken 2 years service with the MFB as a Station Officer shall be eligible to complete the Senior Station officer modules (cl 12.4.4);

(D) Priority among existing employees (which includes lateral hires) for the opportunity to undertake these modules will be in order of the date eligibility was achieved commencing with the earliest eligible employees (which would clearly not be those who had just transferred from another organisation) (cl 12.4.5);

(E) Progression and access to all other promotional courses and/or assessments for which progression is automatic on completion of qualifications and time will be in order of the date employees qualify for access to courses and/or assessments (cl 12.4.6).

(b) Such a provision fundamentally retains the defining features of the current classification provision in the Operational Staff Agreement. That is:

(i) The 'model provides no means of taking a flexible or creative approach to the recognition of prior skill, training and experience';[20]

(ii) Whilst other professions and agencies, such as the ambulance service and nursing, encourage movement, the revised clause continues to be 'a ludicrous model which basically prevents movement'.[21] The revised clause requires successful completion of all MFB modules, and places barriers to eligibility to complete those modules where preference is given to longer

[20] Rau 1 MFB-7 at [95]
[21] Rau 1 MFB-7 at [96]

serving MFB employees. No recognition of seniority within a particular classification is given to lateral hires, in pay or otherwise;

(iii) The MFB, a registered training organisation (**RTO**), delivers industry recognised content in the area of fire and emergency services, yet continues to be prevented from recognising the competency sets that people outside of the organisation might possess. A requirement of an RTO is to recognise individuals who have gained a competency from an RTO.[22]

(iv) Clearly the disincentive to transfer from another fire service to the MFB remains. The provision continues to infringe Re AEU principles on this basis and by impairing the right of the MFB to determine the term of appointment of lateral hires. The maintenance of such hurdles is consistent with the oral evidence of the UFU as follows:

> *'Despite all that, it's the position of the UFU that the MFB is, as you've accepted, to remain a closed shop, no lateral entry?---It's not a matter of being a closed shop, it's about stifling opportunities for those within our organisation, highly skilled fire fighters who would seek and attempt to go for promotion.*
>
> *Maybe you're confused by my question. Earlier you accepted that, yes, it amounts to a closed shop. It remains the position, doesn't it, that the UFU is opposed to lateral recruitment. Correct?---Well, in the agreement it was both the MFB and the UFU who are opposed to it.*
>
> *Sorry, I'll ask the question again. I'm asking about the position of the UFU - - -? ---Correct.*
>
> *- - - for the third time?---Yes, correct.*
>
> *Sorry, what's correct?---That the UFU, as you said, are opposed to lateral entry.'*[23]

(c) The carve out at the beginning of the classifications clause in the revised log, namely, that the provisions of this clause shall be interpreted and applied so as not 'to limit the right of the employer to determine the number and identity of the persons whom it wishes to employee or the term of their appointment' (clause 12.1) is illusory in a practical sense. For obvious reasons, this cannot be a means acceptable to the MFB of recasting UFU claims to ensure they do not contain impermissible content.

13.7 Contracting Out

(a) To meet an argument about a ban on contracting out not being permitted, the UFU proposed, at cl 13.2.3 of its revised log, that if contracting occurs *'each*

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[22] Rau 1 MFB-7 at [97]
[23] Angwin, Transcript PN7928-Transcript PN7932

firefighter directly affected by the appointment shall be paid an allowance of 15% of base salary for the period…..'.

(b) Mr Lee was not sure if this would make contracting out uneconomic (transcript PN 9418) or make the clause not work (transcript PN 9419). Leaving aside his views and intents; such a clause would no doubt infringe RE AEU principles by impairing the right of the MFB to determine the number and identity of its employees and term of appointment (of the contractors) and would not pertain to the employment relationship between the MFB and the firefighters. These matters are not decided on the basis of some sort of clever drafting – the substance and effect is clearly crucial.

13.8 Staffing Numbers

(a) Redrafted clause 39 of the UFU's revised log allegedly addresses Re AEU issues by removing the express requirements in respect of minimum crewing, instead designating the new arrangements as 'MFB Systems Conditions', the failure to comply with which will be deemed an 'unsafe system'. Further, clause 39.4 of the revised log provides that 'an employee shall not be required to undertake and shall be entitled by force of this clause to decline to undertake, operational response duties in the event of non-compliance with a MFB Systems Condition'. The Systems Conditions include:

(i) the minimum crewing chart and Strategic Location Profile at Schedule 2, which among other things requires the number of MFB firefighters to be increased by 100 beyond existing staffing requirements, and otherwise dictates employee numbers and the location of appliances;

(ii) the GARS matrix (now incorporated at Schedule 16, not previously included in the Operational Staff Agreement), thus seeking to prevent further the MFB modifying its operational response to incidents;

(iii) a range of procedures, including in relation to health and safety;

(iv) the requirement of seven to the fireground.

(b) Further, any reduction in establishment profile, daily crewing or the 100 additional firefighters will entitle **all employees** to a $2.50 allowance per shift/day (or part shift/day) that the reduction or vacancy occurs.

(c) Clearly these provisions in their effect impair the right of the MFB to determine the number and identity of its employees as they did previously.

(d) The provisions also contain non-pertaining matters as contemplated by s172 of the FW Act.

(e) Further, proposed clause 39 maintains and introduces additional terms that conflict with the MFB's stated bargaining position, as first expressed by letter to the UFU dated 15 April 2013,[24] by:

(i) restricting or affecting how the MFB acquires and allocates its resources;

(ii) containing clauses that effectively allow an organisation external to the MFB to interfere and/or restrict organisational and operational decisions of the MFB;

(iii) containing clauses that are unclear, ambiguous and open to differing interpretations and cause confusion (including who will be entitled to an allowance under clause 39.5.3 and when and which allow employees to refuse to follow directions in respect of operational response duties in a broad range of circumstances);

(iv) containing content that should be contained in policy and procedures (including GARS, Rescue Exposure Confinement Extinguishment Fire Duty, Schedule 18 Systems of work, Schedule 19 Breathing Apparatus Procedures),

(f) This is not a redraft to address Re AEU limitations. In substance, the UFU maintains all existing obligations (and adds more in, including the GARS system). Mr Lee accepts that it is a mechanism,[25] and when it was put to him that it maintained minimum staffing, he said.....'I think it goes to dealing with other issues than setting minimum numbers' [26].

(g) Again, notwithstanding the views of Mr Lee, such a clause would be in conflict with Re AEU.

(h) **Other matters**

It is also the case that the log UFU maintains requirements to agree on all aspects of articles of clothing, equipment, technology, station wear and appliances (accepted by Mr Lee at transcript PN 9428). Consultation provisions and dispute procedures are also maintained. The requirement that decision making be by consensus is retained by clause 16.2.4, and recommendations of sub-committees will also be by consensus (clause 16.5). Clause 17 provides that proposed changes to any matters pertaining to the employment relationship will be subject to the clause 16 process. Further, the UFU log seeks to expand on the matters requiring consultation, extending to matters now including Climate

[24] at Stacchino 1, MFB-18, annexure PS-5
[25] Transcript PN 9425
[26] Transcript PN 9427

Hub (cl 27) and multi-agency drills (apparently in acceptance of the position that no such requirement existed under the 2010 Agreements, despite the UFU's attempts to interfere with these drills on varying and unclear bases.[27] The broad matters that may be subject to a dispute have been retained by clause 21 and, at clause 21.4, the status quo provision. Unsurprisingly Mr Lee said the UFU was very committed to such matters (transcript PN 9429). The power of the UFU to stop redeployments or moving stations remains.

13.9 It is important to recognise in this case with respect to bargaining positions (and many other matters) that the Commission has not heard from the decision makers and senior officers of the UFU. Mr Marshall, the most senior officer of the Union has not given evidence. Mr Mullett, described by Mr Psaila as the head of the bargaining committee,[28] has not given evidence.

13.10 Mr Lee gives many opinions about bargaining, legal matters and union positions which are critical of the MFB. He is an inexperienced industrial officer with no training in law, OHS, industrial relations or experience of industrial matters such as consultation or dispute procedures outside the UFU.[29] His only real experience of bargaining is with the UFU and that was in 2010 regarding operational firefighters. The evidence as to the intent, tactics and willingness to progress bargaining could only have been provided by Mr Marshall or perhaps Mr Mullett.

13.11 Further, that Mr Lee considers there are options under the FW Act in respect of bargaining conduct does not advance any contrariness to the public interest.

13.12 The UFU says at [46] of its Submissions that the Commission 'should not lightly conclude that bargaining is exhausted'. As to this:

(a) There is no requirement in s.226 that bargaining be exhausted. The prospects of reaching an agreement in the foreseeable future may well be a consideration;

(b) On any assessment based on all the evidence, such prospects are very small at present.

13.13 The UFU evidence is that historically bargaining takes a long time.[30] Yet according to this evidence of Mr Lee, the longest time it has ever taken to negotiate an Operational Staff Agreement with the UFU has been 18 months (which includes approval and other processes up until the time of commencement).

13.14 That agreement will not be reached in the foreseeable future is evidenced by the following:

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[27] See for example first statement of O'Connell, MFB-25 at [17]
[28] Transcript PN8630
[29] Transcript PN9153-PN9173
[30] Casey Lee UFU-23 at [12]-[14]

(a) the current bargaining round was commenced by the MFB in April 2013 some 16 months ago; [31]

(b) not a single clause has been agreed to date;[32]

(c) the MFB has very strong views as to what it will not include in the Operational Staff Agreement; on which the UFU has fundamentally also been immovable. As described above, following the making of the present application, the UFU has attempted to recast some of its claims. However, it has done so in ways which are unreasonable and/or illusory in the sense that the reformulation does not address the issues of concern and maintains the substance of all claims;

(d) the parties are effectively at an impasse in negotiations (Stacchino MFB-18 at [52]).

13.15 The UFU 'disagrees with the proposition that negotiations have not been fruitful'.[33] It also attributes any lack of progress to the MFB having 'refused to bargain about anything other than what it terms 'threshold' matters: namely, consultation, dispute resolution and classification' since February 2014.[34]

13.16 The evidence is that:

(a) bargaining since February 2014 has focussed on, but has not been limited to, the MFB's 'threshold' claims;

(b) it certainly has been, and remains, the MFB's position that these matters are so fundamental to any new agreement that there is little utility in deferring them to later in bargaining. The MFB has therefore resisted attempts to divert the bargaining away from these issues;

(c) despite this, however, the MFB has provided a detailed response to both the UFU's initial log of claims [35]and, in June 2014, a response of some 200 pages to the UFU's revised log provided on 9 May 2014 (some time after the MFB's application to termination the 2010 Agreements was made). A response that was in relation to all matters, not just the threshold issues;

(d) Further, any suggestion that it is the MFB's conduct that has resulted in the lack of movement is further called into question by the parallel experience of the CFA in its current bargaining round with the UFU, in respect of which Deputy President Smith stated on 2 July 2014:

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[31] Stacchino 1 MFB-18 at [47]
[32] Stacchino 1 MFB-18 at [52]
[33] Casey Lee (UFU-23) at [72]
[34] Casey Lee UFU-23 at [72]
[35] Stacchino reply MFB-19 at [18], annexure PS-2

'The parties have been engaged in bargaining since March 2013 and it appears that little significant progress has been made, although there have been numerous meetings and a considerable amount of material exchanged.' transcript PN9387-9389

(e) In any event, the critical point is that 16 months after bargaining has commenced:

'the parties remain far apart on almost all aspects of the MFB's Proposed Agreement. In particular the parties' views on content which offends the principle set out in Re AEU, and in relation to the consultation and dispute resolution aspects of replacement agreements, appear irreconcilable' [36]

13.17 Although the UFU 'disagrees with the proposition that negotiations have not been fruitful' (Casey Lee (UFU-23) at [72]), the evidence does not substantiate this position. A close review of the UFU's revised log at Stacchino MFB018 annexure PS-57, and the agreed items document at Stacchino reply MFB-19 annexure PS-4 shows that:

(a) The UFU has made no concessions in respect of any of the threshold issues:

(i) The UFU right of veto has been retained throughout the consultation process and in respect of the other matters requiring UFU agreement in the 2010 Operational Staff Agreement, including in respect of protective gear and equipment, all contrary to the recommendations of the Lewis Report. Moreover, the revised log expands the circumstances requiring consultation;

(ii) The dispute resolution process essentially applies to all permitted matters and despite the evidence of Lee,[37] there has been no agreement to limit the scope of the dispute resolution process in accordance with the MFB's position on the threshold matters;[38]

(iii) The status quo requirement in the dispute resolution provision has been retained;

(iv) Despite lengthy amendments to the classification clause, the provision still effectively prevents lateral recruitment.

13.18 Both parties have strongly held positions on the key matters being negotiated this bargaining round.

13.19 The evidence before the Commission and as highlighted in the appendices to these submissions clearly demonstrates just how important these matters (particularly the removal the UFU's veto right and the status quo provisions of the dispute resolution

[36] Stacchino initial statement at [146]
[37] UFU-23, at [147]-[151]
[38] Stacchino Reply MFB-19 at [46]-[49] and annexure PS-4

procedure) are to the effective functioning of the MFB and its capacity to protect both the community and its employees.

13.20 The same evidence also demonstrates the importance of these provisions to the UFU. That is, the critical role that these provisions play in empowering the UFU and consequently maintaining, if not increasing, its role in the workplace.

13.21 The MFB considers it has good reasons for taking the position it has on these critical matters. Nor, it submits, is this a relevant consideration for the purposes of s 226(a) of the FW Act.

13.22 The MFB is of the view that the UFU has been dilatory and that there is no incentive for the UFU to bargain due to the existence of various clauses in the Agreement which it does not want to lose. Much of its conduct has not been designed to progress bargaining expeditiously or indeed at all. However, the MFB agrees with the submissions of the UFU[39] that no party is required to make concessions, a party is free to bargain on a package basis, good faith bargaining does not require bargaining to occur in a particular manner or over specified matters and that 'the UFU is not obliged to put self interest or the perceived interests of its members aside'.

14 The need to ensure the efficient and viable operation of the enterprise

In general, such a matter would be irrelevant to the public interest.[40] However, in the circumstances of an emergency service, the efficient and viable operation of the service may affect the public interest. This need would in any event be a consideration under s.226(b) and is considered later in this Submission in respect of appropriateness.

15 Problems relating to the continued operation of the agreements

Again, in general, such a matter would be irrelevant to the public interest. It is however a real consideration under s.226(b).

16 Provisions of the Operational Staff Agreement dealing with its renewal and/or termination

16.1 Again, as above, the existence of an agreement and its terms can hardly be a factor in the public interest in deciding whether an agreement should be terminated. That would

[39] At [47] of its primary Submissions

be incongruous. In *Tristar Steering v AWU* [2007] AIRCFB 506, a Full Bench decided to terminate an agreement under s.170MH of the WR Act. There were various allegations of breach of the agreement, a failure of bargaining due to the employer refusing to discuss renewal of the agreement (a position held to not create a public interest consideration) and a clause which provided: 'This agreement shall remain in force until 30 September 2006. Three months prior to the end of the life of this agreement, the parties agree to commence negotiations with the aim of formulating a new agreement before the expiry date of this agreement is reached. Termination was not seen as contrary to the public interest on this ground either'.[41]

16.2 Further, provisions in the Operational Staff Agreement, such as agreeing that the agreement shall remain in force until replaced by a new agreement, (Clause 4.1) cannot operate to prevent an application for termination succeeding where the statutory criteria are met. This is because:

(a) It would be incongruous if a term in an agreement could prevent or fetter a statutory right;

(b) The provision above really describes the statutory scheme following the passing of the nominal expiry date. It can hardly be read as evincing an intention on the part of the parties to preclude the exercise of a statutory right to seek termination;

(c) Further to (b), should any weight be attached to the Deed (dealt with further later in this Submission), it expressly recognises the effect of termination of the Operational Staff Agreement under the FW Act;

(d) The recent decision in *Toyota Motor Corporation Australia Limited v Mamara* [2014] FCAFC 84 makes clear that the terms of an enterprise agreement cannot be inconsistent with or prevent the exercise of a statutory right under the FW Act. The issue in Toyota was whether a No Extra Claims clause in an enterprise agreement prevented (without its prior removal) variation of the terms of the agreement by the Commission in accordance with the FW Act. Applying the established principle that delegated legislation cannot be repugnant to the Act which confers the power to make it, the Full Court held that an enterprise agreement similarly could not be repugnant to the FW Act. The No Extra Claims clause was inconsistent with or repugnant to the terms of the FW Act which allowed variation of enterprise agreements and, as such, was invalid.[42] Similarly, Parliament has, through the FW Act, said that enterprise agreements may be terminated in certain circumstances. To the extent that clause 4.1 prevents, or qualifies that right, it is invalid. On this basis, it is submitted that the terms of

[41] See [22] Tristar PR77415
[42] See [96] – [97]; [105]

clause 4.1 would be an irrelevant consideration for the Commission in exercising its termination powers.

17 Re AEU and non-pertaining content

17.1 The existence of content in the 2010 Agreements that on its face, is inconsistent with the constitutional limitations expressed in Re AEU could raise a public interest. That is, such content would be an attempt or in fact limit the ability of the State of Victoria, through its agencies, to operate as it wants to discharge its functions as a Government. It certainly would be not contrary to the public interest to terminate such an agreement. This would also be a consideration under s.226(b). Similar observations may be made about non-pertaining matters such as bans on contractors. A summary of the principles in Re AEU together with a table setting out the provisions which the MFB says infringe Re AEU principles or contain non pertaining matters, and the associated rationale is set out in **Appendix C.**

18 Conclusion as to Contrariness to the Public Interest

The MFB submits that on consideration of those matters relevant to this issue, there is no contrariness to the public interest in terminating the 2010 Agreements.

19 Section 226(b) - Appropriateness of Termination

19.1 It is not correct to claim, as the UFU does, that this paragraph comprises a 'higher threshold for allowing a termination'[43] nor 'a more generous threshold for termination'. Indeed circumstances may in many cases, make it more appropriate to terminate the agreements. This is one such case. Again the terms of the FW Act need application.

19.2 Some assistance may be gained from the observations of Lawler VP in *Re Tahmoor Coal Pty Ltd* [2010] 204 IR 24 (**Tahmoor**) and Vice President Watson in *Energy Resources of Australia Ltd v Liquor, Hospitality and Miscellaneous Unio*n [2010] FWA 2434 (**ERA**). Consistent with those decisions, the Commission has to make an assessment within the context of the subject matter and scope and purposes of the legislation. That assessment will include whether termination will enhance or reduce the prospects of the parties concluding a new agreement through bargaining.[44] The promotion of productivity is another matter that needs assessment.[45]

19.3 The explicit considerations here are those set out in s.226(b) (i) and (ii).[46]

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[43] UFU primary Submissions at [21]
[44] *Tahmoor Coal* at [50]
[45] *ERA* at [27]
[46] See *Energy Resources* at [15] and [16]

20 Views of employees, each employer and each employee organisation

20.1 The positions of each are:

(a) the employer wants the agreements terminated;

(b) the vast majority of the employees do not;

(c) the UFU does not.

20.2 Such a circumstance cannot be unusual in the context of the FW Act. Agreements almost inevitably contain benefits to employees in excess of those contained in modern awards. Removal of such benefits is rather likely to be opposed. As was said in *Tahmoor* at [44]: 'usually, as here, a contested application will see the employer wanting an expired agreement terminated and the employees and union (if any) opposing such termination'.

20.3 In the present case, there is a survey which indicates that on the basis of a 57.5% response rate, the vast majority of employees oppose termination.[47]

20.4 Indeed given what employees were told by the UFU, it is hardly surprising that an overwhelming majority oppose termination. Indeed it is surprising only 57.5% responded to the survey. The UFU had done all it could to misrepresent the effects of termination. The survey questions were even sent in advance of the actual survey - annexed to an inflammatory letter misrepresenting the MFB's application to terminate the agreements.[48] This followed a number of other UFU communications which misrepresented the position of the MFB and could reasonably be viewed as promoting distrust of the MFB and its motivations in seeking termination of the 2010 Agreements (see below).

20.5 In assessing the views of employees, the Commission will form its own view about the questions asked – and the preceding material provided by the UFU to survey participants.

(a) **March Bulletin**[49]

The UFU Bulletin of 28 March 2014 was put to Mr Casey in cross examination at transcript PN9449 – transcript PN9450. It was authorised by Mr Marshall. At the bottom of the first page it stated, 'The following is a list of conditions that are contained in your enterprise agreement but will be removed if the MFB are successful in their application,' and then it produced the index page of the Operational Staff Agreement with 'Abolished. Abolished. Abolished. Abolished.'

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[47] Exhibit UFU-48
[48] Exhibit MFB-52
[49] Exhibit MFB-50

stamped in red capitalised letters across its entirety. On the final page under the heading 'Background', it said 'Hence the MFB have now sought to engage in a legal manoeuvre that wipes out all of your conditions; if successful, leaving you with only the bare minimum award'.

The reader of the document would think that they would be stripped of all their agreement terms this was despite the fact that the MFB made clear in its statutory declaration accompanying its termination application (at paragraph 2.1(f)) that it would be providing undertakings.

The Bulletin went on to engender distrust in the MFB stating that:

> *'You should be extremely disappointed in the duplicitous, disingenuous and disrespectful attack on your conditions of employment…*

(b) **April Bulletin**[50]

The UFU Bulletin of 9 April 2014, headed '**MFB RENEGES ON AGREEMENT BUT WILL GIVE AN 'UNDERTAKING' YEAH SURE!**' was put to Mr Lee in cross-examination at transcript PN9454 - transcript PN9506. This was again an inflammatory bulletin designed to mislead and provoke mistrust in employees.

(c) **Survey questions and Litigation Update**[51]

The UFU letter of 22 April 2014, with an attached 'Litigation Update', an analysis of the terms of the Operational Staff Agreement and the Modern Award; and then attaching the survey questions in advance of the survey, was put to Mr Lee in cross examination at transcript PN9461 – transcript PN9450. The UFU material asserted that it was the MFB's intention to reduce working conditions to the Modern Award. This was wrong and highly misleading. It casts doubt on the integrity of the entire survey. Mr Lee accepted that the MFB had expressed no such intention. Relevantly, when questioned by Mr Parry QC at transcript PN 9489 – transcript PN9496:

> *'That's headed - there's a heading Litigation Update, and it says, on the left-hand side, 'MFB applied to terminate operational staff agreements.' And it has on the right-hand side, under the picture, 'MFB's intention is to have the working conditions reduced to the modern award, which is the Firefighting Industrial Award 2010.' Can we accept that the MFB have never expressed any intention to reduce the working conditions to the modern award?---I'm not sure if they've - exactly what they've expressed in relation to the modern award.*
>
> *Did you write this?---I don't recall.*
>
> *You don't recall?---No.*

---

[50] Exhibit MFB-51
[51] Exhibit MFB-52

You might have written it, you might not have, you just don't remember?---Yes.

It's only three or four months ago - three months ago, Mr Lee, and it's a significant matter. You simply don't remember writing this?---I write a lot of things all the time. I just don't remember.

You might have written it, you might not. That's your evidence, is it? Well, that's your evidence - - - ?---I don't know - - -

- - - you might have, you might not have?---I don't know who has written it.

But it says about the MFB's intentions, and you know of no such expressed intention, do you, to reduce the working conditions to the modern award?---No.'

(d) The denials, uncertainties and lack of recall by Mr Lee are unsatisfactory evidence in a case such as this. Plainly these documents were deliberately drafted by someone in the UFU to create exactly the reaction they did, dealt with below. This really highlights the absence of Mr Marshall, who authorises all bulletins,[52] and makes public statements.[53] In the absence of any explanation from Mr Marshall, the proper inference is that the UFU consciously and deliberately misled its members about the effect of the termination application with the intent of using their consequent reaction in these proceedings to oppose termination. That is the proper inference to draw based on the authorities.[54] Further, it is all too easy sometimes not to recognise the seriousness of such conduct. It is conduct in breach of the FW Act. The MFB has a workplace right to make this application – it is able to initiate this proceeding (s. 341(1)).[55] The above statements would be false and misleading statements about the effect of the exercise of that workplace right (see s.345(b)).

That the UFU is prepared to engage in such conduct is a consideration that goes to the assessment of the views of employees and their reasons for opposing termination, as well as the appropriateness in all the circumstances of termination.

(e) **No Bulletin about the undertaking**

It was also misleading of the UFU not to inform its members of the Undertakings that would preserve terms and conditions of employment. Relevantly, at transcript PN9499 – transcript PN9506, the following was put to Mr Lee:

'Can you understand that some firefighters may well form the view from reading this bundle of documents and this survey question that it was

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[52] Lee Transcript PN9199
[53] Lee Transcript PN 9198
[54] See eg *Jones v Dunkel* (1959) 101 CLR 298
[55] That employers have workplace rights has been held in *BHP Coal Pty Ltd v CFMEU* [2013] FCA 1291 (under appeal) at [121], also see s.336(2)

the intention of the MFB to reduce terms and conditions to the award minimum, couldn't they?---I don't know what firefighters would have understood, but that last sentence in question 2, in its entirety, refers to the undertaking as well.

You're aware that the MFB has given a detailed undertaking to the workforce and to the commission?---Yes.

And presumably you've read through it?---Yes.

Has the UFU sent out any bulletins explaining in detail the content of the undertaking as against the 2010 agreement, or as against the modern award?---I'm not sure.

Mr Lee, it would be a fairly significant exercise to put that together, wouldn't it? And presumably you would be aware if there had been a document like that put together, wouldn't you?---I've been on leave for two weeks. I wouldn't necessarily be aware of it.

Before you went on leave, you're not aware of anything like that happening?---I can't recall it, no.

It would be highly likely that you would know of the existence of such a bulletin drawing the attention and analysis of the undertaking to the attention of employees, wouldn't it?---Yes.

And you know of no such document being circulated?---I can't recall it right now, no.'

20.6 Indeed a perusal of many of the witness statements of firefighters reflect what they were told by the UFU and show real concerns about:

(a) Losing pay;

(b) Losing the 10/14 roster;

(c) Losing superannuation;

(d) Losing particular conditions relevant to them.

20.7 It is clear that these statements were all made before the full undertaking was provided. The Undertakings render nugatory many of the concerns expressed by the employees for whom statements were tendered that were drafted prior to the Undertakings. In addition to the written Undertakings it is clear, as attested to by Chief Officer Rau[56] at [22], that:

> *'Nevertheless, in the event that the MFB is successful in its application to terminate the Agreements, in accordance with the undertakings there will be -*
>
> *(A) No loss of, or change to, the rostering system, including the 10/14 shift system. Employees will continue to be rostered for work in exactly the same way as they are now.*
>
> *(B) No reduction in the number of employees required to crew appliances.*
>
> *(C) No loss of, or change to, the current deployment model in that there will be seven firefighters on the fireground before the commencement*

[56] Exhibit MFB-8; Chief Officer Rau also satisfactorily addresses many of the other concerns raised in the UFU employee statements.

of safe firefighting operations; except where the Chief Officer determines that safe firefighting operations can be conducted with a single appliance. An example of this might be responses to bin-fires, wash aways and pole fires.

(D) *No loss of, or change to, the use of the MFB determined response system under the Greater Alarm Response System (**GARS**). Alarm level responses will continue to be met with the same number and types of appliances that are used today.'*

20.8 The MFB wants the agreements terminated. The reasons for this may be broadly described as:

(a) some of the content is operating in a way that is detrimental to the MFB and the achievement of its statutory objectives;

(b) some of the content operates in a way that is detrimental to a productive, fair and balanced workplace;

(c) termination will enhance the prospect of the parties concluding new agreements through bargaining.

21 The circumstances of the employees, the employer and the UFU and the likely effect that the termination will have on them

21.1 The Commission is required to consider these matters in its assessment of appropriateness. The reference to 'likely effect' means just that – not speculation or exaggerated predictions based on worst case scenarios. Into this assessment will come the undertakings of the MFB and the terms and conditions they preserve.

21.2 The employees work in a disciplined service subject to the MFB Act. Their terms and conditions are relatively generous. In no sense can they be described as low paid or disadvantaged. Periods of service are long. They have security in their employment.

21.3 The MFB is a statutory authority as described earlier in these Submissions. It is funded by a fire levy imposed on all property owners in Victoria.[57] Peter Rau sets out its operations in detail in [10]-[19], Ex MFB 7. The MFB is required to operate productively and efficiently. As noted in the MFB's 2013-2014 Business Plan, UFU-8 at p12, one of the internal factors that will challenge MFB service delivery is:

> *'a tight fiscal environment with greater transparency and accountability applied to MFB budgets by Government, creating new challenged when allocating funds against priorities. MFB will require strong, evidence based frameworks for the creation and maintenance of its resources, along with well-defined targets, measures and reporting processes.'*

[57] MFB Annual Report 2012-3, UFU-9, p27

21.4 Further, one of the MFB's priorities to improve service continuously to Melbourne's communities, in accordance with the MFB's enterprise risk framework, is to:

> *'address the long term financial sustainability of MFB to support service delivery in an economically constrained environment.' MFB 2013-2014 Business Plan, UFU-8 at p13*

21.5 The fire levy is a tax on Victorians. Inefficient and unproductive operation and waste not only hinders the operations of the MFB, but is also a cost to Victorians.

21.6 The likely effect of termination on operational employees, including Commanders, will be as set out in the undertaking, provided and summarised in Ex MFB 5 as follows:

> *1 The Applicant (**MFB**) has applied to the Fair Work Commission (**FWC**) operational staff undertaking for termination of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Operational Staff Agreement 2010 (**Operational Staff Agreement**).*
>
> *2 Should the FWC terminate the Operational Staff Agreement, the MFB undertakes to do the following from the time of termination:*
>
> *(a) Maintain all terms setting out monetary entitlements, in the form set out in the Operational Staff Agreement. This includes wages and all allowances;*
>
> *(b) Continue to roster the operational workforce in accordance with the practices applicable at the time of termination;*
>
> *(c) Determine the allocation of employees, including numbers that will be recalled and retained, in accordance with risk and demand;*
>
> *(d) Consult with employees and their representatives, including (but not limited to) the United Firefighters' Union of Australia (UFU), in respect of matters including:*
>
> *(i) Definite decisions to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees; and*
>
> *(ii) changes to regular rosters or ordinary hours of work.*
>
> *(d) Consultation with employee representatives under paragraph (d) above will continue to take place through an Operational Committee (Committee) which will be comprised of MFB and UFU representatives, with the capacity for additional nominated representatives of employees who are not members of the UFU.*
>
> *(i) Matters can only be referred by the Committee to a sub-committee by consensus;*
>
> *(ii) No proposal will require the agreement of employees or their representatives in order to progress to implementation.*
>
> *(e) Maintain the current classification structure and descriptors, with the necessary changes to allow lateral recruitment at all levels above Recruit. There will no longer be automatic*

progression based on trigger figures – promotions will be as and when determined by the MFB when vacancies occur;

(f) Continue to deem all employees to be operational for the purposes of membership of Emergency Services and State Super (ESSS);

Maintain all leave entitlements in the terms that applied prior to termination.

3 The terms that govern the obligations of the MFB and the entitlements of employees following any termination of the Operational Staff Agreement, and which give effect to the above undertakings, are detailed in the attached document (Undertaking).

4 The MFB will comply with the Undertaking for a period of 12 months from the time of termination. The MFB will consult with employees and their representatives in respect of any decision to vary the Undertakings after this 12 month period, prior to making any such variation.

21.7 The likely effect of termination on the ACFOs will be as set out in the ACFO undertaking, provided and summarised in Ex MFB 6 as follows:

1 The Applicant (MFB) has applied to the Fair Work Commission (FWC) for termination of the Metropolitan Fire and Emergency Services Board, United Firefighters Union of Australia, Assistant Chief Fire Officers Agreement 2010 (ACFO Agreement).

2 Should the FWC terminate the ACFO Agreement, the MFB undertakes to do the following from the time of termination:

(a) Maintain all terms setting out monetary entitlements, in the form set out in the ACFO Agreement. This includes wages and all allowances;

(b) Consult with employees and their representatives, including (but not limited to) the United Firefighters' Union of Australia (UFU), in respect of:

(i) Definite decisions to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees; and

(ii) Changes to regular rosters or ordinary hours of work.

(c) Consultation with employee representatives under paragraph (b) above will continue to take place through an Operational Committee (Committee) which will be comprised of MFB and UFU representatives, with the capacity for additional nominated representatives of employees who are not members of the UFU.

(i) Matters can only be referred by the Committee to a sub-committee by consensus;

(ii) No proposal will require the agreement of employees or their representatives in order to progress to implementation.

(d) Maintain the current classification descriptors;

(e) *Continue to deem all employees to be operational for the purposes of membership of Emergency Services and State Super (ESSS);*

(f) *Maintain all leave entitlements in the terms that applied prior to termination.*

3 *The terms that govern the obligations of the MFB and the entitlements of employees following any termination of the ACFO Agreement, and which give effect to the above undertakings, are detailed in the attached document (Undertaking).*

4 *The MFB will comply with the Undertaking for a period of 12 months from the time of termination. The MFB will consult with employees and their representatives in respect of any decision to vary the Undertakings after this 12 month period, prior to making any such variation.*

21.8 The MFB has decided, for reasons dealt with later in this Submission to extend the undertaking to a period of 18 months. No decisions have been made as to the course that the MFB will pursue following the expiry of that period, should no enterprise agreements have been made by that time. It cannot and should not be assumed that in that event it is likely that there will be reversion to award conditions. There is no evidence to support that assumption.

21.9 In some cases, termination of an agreement may have particular effects. For example, it may remove or diminish accrued entitlements, it may reduce redundancy entitlements when a business if facing closure, it may affect superannuation entitlements etc. Such consequences may take on particular significance. Such particular effects are not present here.

22 Undertaking and likely effects

22.1 Undertakings have been given in other like cases in order to render post-termination arrangements more certain and/or maintain some existing employee entitlements for a period of time, see:

(a) KBR at [45];

(b) Tahmoor at [13];

(c) ERA at [7].

22.2 In *KBR* there was an undertaking to maintain employees' wages for a period of one month while negotiations for an agreement continued. After that time, if agreement had not been reached, the moving party for termination proposed a scheme of remuneration involving the maintenance of the current roster but a reduction in earnings of something around 10%. Relevantly, after referring to the undertaking, at [46] of the decision the Full Bench of the Commission stated that termination of the agreement with the loss of significant benefits was not of itself contrary to the public interest.

22.3 In *Tahmoor* the moving party gave an undertaking to maintain existing monetary and leave entitlements of the employees. Various other conditions were not to be continued. At [13] Lawler VP rejected a submission of the CFMEU that the undertaking was unenforceable and otherwise bad because it did not specify an end point such that Tahmoor could withdraw from it at any time. At [13] Lawler VP relevantly said:

> *'It is inconceivable that a Court with a general equitable jurisdiction lacks the power to make orders enforcing an undertaking of the sort given by Tahmoor. Equity regards as done that which ought be done. Further, as Tahmoor points out, the undertaking does specify a duration: it will terminate on approval by Fair Work Australia of a new enterprise agreement between Tahmoor and employees covered by the undertaking.'*

22.4 In *ERA* at [7] the moving party gave an undertaking that, upon termination of the industrial agreement, employees would maintain their current salaries and other benefits, until the employees agreed to other terms and conditions of employment, or a new enterprise agreement was made that applied to the employees.

22.5 In any event the undertakings:

(a) are provided by the MFB;

(b) are intended to be complied with by the MFB;

(c) maintain employees' essential terms and conditions including:

(i) wages

(ii) allowances

(iii) rosters

(iv) accrued entitlements

(v) superannuation

(d) provide a basis for the MFB and its employees to continue to provide services in accordance with the MFB Act.

22.6 Termination of the 2010 Agreements will not remove or affect employee access to UFU representation, but will better enable representation of those employees who are not UFU members.

22.7 It is important that it be understood that the vast majority of employment conditions will remain unchanged. Amongst other things:

(a) Counselling, discipline and adverse reports obligations remain;

(b) Employee representation benefits remain, but are extended;

(c) All of the various committees remain including, for example, the Consultative Committee, the Rostering Committee and the Resources, Allocation and Deployment Advisory Panel (**RADAP**);

(d) Rostering will continue in accordance with practices that existed immediately prior to the termination of the Agreements;

(e) The OHS provisions in Schedule I will continue to be applied;

(f) Wages and allowances provisions are maintained;

(g) Superannuation entitlements are maintained;

(h) All leave entitlements and accruals remain;

(i) The 10/14 roster remains;

(j) Rest and recline entitlements remain.

22.8 In the event of termination and implementation of the undertakings, there will be some changes to certain terms and conditions. These include particularly:

(a) changes to the consultation provisions;

(b) changes to the dispute settling procedures;

(c) the removal of a minimum manning chart;

(d) no requirements to agree on new uniforms or equipment;

(e) no requirements to agree on new or refurbished stations or redeployments thereto;

(f) the removal of restrictions on lateral recruitment.

22.9 Each of those is considered below in light of their likely effect on the employees, the employer and the UFU.

23 Consultation provisions to operate following termination

23.1 Clauses 9-16 of the operational staff undertaking deal with consultation. Clauses 5-11 of the ACFO undertaking deal with consultation.

23.2 The consultation provisions in the undertakings are based on the Modern Award. In fact, the consultation process in clauses 10 and 11 of the operational staff undertaking and 6 and 7 of the ACFO undertaking replicates clauses 8.1 and 8.2 of the Modern Award. These are consultation provisions that have a long history in industrial matters, deriving from the original TCR case.[58] They appear in many industrial instruments.

23.3 The Modern Award is a recent instrument made by the Commission following submissions and evidence from many parties including the MFB and the UFU. The UFU can hardly criticise its contents in respect of consultation when it made no

[58] Termination, Change and Redundancy Case (1984) 8 IR 34 at [99]-[100]

submission about the consultation provisions in the draft award circulated. Indeed from this it appears that the UFU was not unhappy with those provisions. Mr Lee can really add nothing to this.[59] He had no involvement in the submissions and indeed knew little about the modern award making process. He is in no position to assert that these procedures are not suitable for firefighting employees. It should be assumed that the Full Bench performed its functions in making the modern award in compliance with its statutory obligations. There is no reason why MFB firefighters deserve different treatment to all the other firefighters covered by the modern award.

23.4 It cannot be a tenable argument that applying the consultation provisions in the Modern Award, designed for firefighters across the country, operates unfairly or unreasonably on firefighters employed by the MFB, or creates risks to the health and safety of firefighters or the community.

23.5 Further, there are a variety of consultation provisions in the enterprise agreements of fire services in other States and Territories (Ex MFB 4). None have a veto. The UFU acknowledges that no other fire service has provisions like the MFB; see Lee at transcript PN9349:

> *You refer in paragraph 54 to the subject of consultation and dispute resolution being regulated by all the enterprise agreements. You say the regulation of consultation and dispute resolution is not uniform. You then say that the various provisions - I think your point is there that no-one's got the modern-award provisions. Can we also agree that no-one's got the provisions regarding consultation and dispute resolution contained in the MFB operational award either, do they?---No.*

23.6 The UFU in its primary Submissions says about the removal of the consultation provisions:

(a) the consultation provisions have been there for many years ([77]) and were agreed in successive enterprise agreements ([81]);

(b) the consultation and dispute resolution clauses do not operate to curtail the ability of the MFB 'to initiate any change'… 'that capacity is unaffected' ([84]);

(c) 'the clauses curtail the ability of the MFB to initiate change unilaterally in the exercise of an outmoded conception of absolute management prerogative' ([84]);

(d) there needs to be intrusion into managerial prerogative as the work is dangerous and lives of firefighters may be put in jeopardy at any time. They need to have a 'substantial say about the way in which, their work is carried out'. 'To disallow such an involvement will have a very important effect on the confidence with which firefighters enter upon their firefighting tasks' ([86]);

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[59] See Transcript PN9331 to Transcript PN9344

(e) the clauses do not operate as a right of veto ([88]) as the MFB's rights are co-extensive with those of employees;

(f) there are numerous examples of the MFB proposing to introduce equipment which was exposed as unsafe in the consultation phase and thereafter rectified. Rigorous discussions and testing needs to be done beforehand ([94]);

(g) firefighters are the ones with first-hand experience ([95]);

(h) clause 20 can be invoked if there is trouble with consultation.

23.7 Each of these is dealt with below.

24 Not a veto

24.1 It is appropriate to start with (e) – the clauses do not operate as a veto. As detailed below, the clauses clearly operate as a veto in the hands of the UFU, as a matter of law and of fact. The difficulties this presents are further exacerbated by the status quo provisions of the dispute resolution procedure.

24.2 Legally, there is a need to reach a consensus for a decision to be endorsed. If a decision is not endorsed, then the subject matter of the consultation process cannot proceed.

24.3 As to the practical operation of this veto see the evidence of the UFU President, Mr Hamilton, at transcript PN7421 – transcript PN7430; transcript PN7446:

> *Yes, we've been there. The position is that they make their way through the consultation process and unless the UFU agree during that process the proposal cannot be implemented by the MFB?---By endorsement, yes.*

24.4 A number of UFU witnesses accepted, or stated of their own initiative, that the UFU has a right of veto over consultative processes under the 2010 Agreements.[60]

24.5 In a practical sense, virtually all the UFU witnesses understood and treated the consultation process as involving a veto right of the UFU. That is certainly the MFB experience.

24.6 Some of the UFU witnesses such as Commanders Carter, Brizzio and Trimboli, appear to have the view that a failure to reach consensus can be the subject of a dispute process in which the Commission can make a ruling as to the subject matter of the consultation.[61]

24.7 The above is incorrect. All the Commission can do in a dispute about consultation (where consultation is required by the 2010 Agreements) is make orders about

[60] See for example, Cleary at PN8503-4; Lyons at PN11252-3; Weir at PN11648-9
[61] PN10970-10972; PN11346-11348; PN11843-11849

consultation. This much is clear from the decision of Roe C in *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2013] FWC 4758.[62] The UFU saw the outcome in this case as a victory (see annexure CL-20 to Exhibit MFB-17 Lloyd). In practice it was for them.

24.8 The UFU's view that the provisions do not operate as a veto is neither supported by the evidence, nor the belief of virtually all of the witnesses in the case. What this means is that any change proposed by the MFB (and it is almost inevitably the position that it is the MFB proposing a change) can be vetoed by the UFU in the consultation process.

24.9 What the employees will lose following termination is the ability of their representatives (insofar as the employees are UFU members) to exercise a veto over the subject matter of the consultation.

25 The consultation processes have been there for years.

This is a matter that does not really go to the effect on employees of the removal of the existing consultation provisions on employees. In any event, some points may be made about this:

(a) In the historical EBAs (Ex MFB-3):

(i) Clause 9 of the 1999 EBA set up a Consultative Process which involved Committees, and ability to make recommendations which could be developed on the basis of consensus. Specified clauses could be consulted on;

(ii) In 2002, changes were made to the consultation processes. Prior to the introduction of 'any proposed change' various steps had to be followed. Disputes could be raised explicitly about this. The references to 'recommendations by consensus' was removed and introduced was 'decision making will be by consensus';

(iii) The 2005 Agreement contained clause 9 which maintained this wording;

(iv) The 2010 Agreements change the clause again to remove EBIC and implement a MFB/UFU Consultation Committee. The 2010 Agreements also removed the pre-existing provision which stated that any dispute concerning either party under the consultation provision shall be dealt with in accordance with the agreement's dispute resolution provision. In addition, the 2010 Agreements introduced a new overall procedure requiring matters to commence in the Consultative Committee from which

[62] See first statement of Pearce, MFB-29, [36]-[54]

they are referred to subcommittees as relevant, which in turn make recommendations back to Consultative Committee for endorsement.[63] As O'Connell notes at [117] of MFB-25 this makes the process under the 2010 Agreements more laborious and slower.

(b) The practice has developed, acknowledged by virtually all, that the process can now operate as a veto. The wording of the present clause provides support for this practice.

(c) To suggest somehow that the clause is good because it has been around for a decade ignores such matters as the Uniform exercise from 2000 to 2008 detailed in the Lewis Report and acknowledged by Mr Taylor of the UFU as a bad result for everyone.[64] Although this particular issue concerned what is now clause 88 of the Operational Staff Agreement (Uniforms and Equipment), the principles (as well as the recommendations of the Lewis Report) apply similarly to other veto powers in the 2010 Agreements, including in the consultation procedure.

26 The clauses do not curtail the MFB

That is simply not correct or sustainable on the evidence.

27 The clauses prevent absolute management prerogative

It is the MFB and the Chief Officer and his delegates that have the responsibility to operate the Brigade in accordance with the MFB Act. Sometimes changes that are in the interests of the MFB and the Victorian community have to be made. Interoperability or co-operation with other agencies is an example of this. Movement of appliances to another station is another. Again, sometimes, the employees and their union might resist change for good or bad or selfish reasons. Provided the views of employees and their representatives are listened to and taken into account, the MFB and the Chief Officer have to have the power to introduce change. That is their statutory responsibility. There are no similar precedents of like fire brigades or emergency services in other Australian States or Territories being subject to such a veto power. No employer can properly operate absent a right to make decisions. It is untenable that it continue for the MFB.

[63] See Stacchino first statement, MFB-18, annexure PS-3 (Terms of Reference)
[64] See Taylor PN 12160-12163; See also as a general proposition Brizzio PN11335-11341

28 The work of firefighters is dangerous

There is no doubt that on occasions the work of firefighters is dangerous. That means consultation is important. That means the views of firefighters should be listened to carefully and given proper weight. However, there are others whose views on changes to equipment, appliances, the placement of stations, methods of work etc also should carry weight. The Senior Officers involved in such decisions are experienced and long standing firefighters as well. They have been promoted in recognition of their experience and abilities. Further, they will presumably have a broader view of what the change means for the Brigade, its longer term requirements, its budgetary position, its implications for interoperability with other services and effects on the community. Further, there will be technical people within and outside the Brigade providing advice as well. That should also go into the mix. The nature of the work is not a good reason for a veto to exist.

29 Examples of proposals where consultation identified risks

29.1 That is the purpose of consultation. Views are listened to and acted on. That will remain the case in the event of termination. It should be remembered that in respect of appliances, the process of consultation comes before a comprehensive risk assessment, which in turn precedes commissioning. As Commander McQuade states in his reply statement, MFB-28 at [43] and [45], in relation to the introduction of replacement Ladder Platforms:

> *'I do not disagree with Mr Psaila that consultation is valuable, but these types of issues would be identified and addressed by the MFB prior to commissioning in any case.... My issue is that the UFU lodged a grievance about consultation, which then became a grievance about this issue, which ends up taking up a lot of time and effort into resolving. The MFB carry out a risk assessment for each appliance and this issue would have been identified and addressed.'*

29.2 The examples described in [95] of the UFU's primary Submissions will all be able to occur under a normal consultation process.

29.3 It should also be noted that the 2010 Agreements (and any predecessors) do not provide for consultation directly with employees (or other stakeholders), but only with the UFU. Two points may be made about this. Firstly, the voices of employees are not necessarily heard under the existing agreement processes, particularly (but not only) when those employees are not members of the UFU. Secondly, despite the absence of any legal requirement to do so, the MFB has seen fit to consult directly with affected employees in relation to certain of its proposals where relevant.

29.4 The evidence of Commander O'Connell for example, is that he consulted directly with affected employees in:

(a) managing the design and build project for the new breathing apparatus and Hazmat appliances (see **Appendix U**). He did this recognising that 'staff could see around some corners' that he couldn't.[65] As a result of this consultation, the appliances were designed and built to such a high standard that they were judged to be the best solution to a Health and Safety Issue 2012 at the WorkSafe Awards.[66] This had nothing to do with the agreement consultation process which 'created unnecessary inefficiencies and delayed the introduction of equipment, with no corresponding benefit to the MFB, the equipment or employees'.[67]

(b) trialling a new Chinagraph pencil, introduced for reasons including the protection of firefighter health and safety (see **Appendix AA**). The equipment was simple in nature (akin to a twistable crayon) but important. Employee support for the new equipment was overwhelmingly positive. The initiative was nevertheless required to proceed through the consultative process in the 2005 Agreement, creating an inefficiency that resulted in no additional input or benefit but which, on the contrary, delayed the full implementation of this health and safety initiative.[68]

29.5 Similarly, the evidence of Chief Officer Rau in response to the MFB's consultation in respect of the Craigieburn facility, was that this too occurred outside the 2010 Agreement processes.[69]

30 Firsthand experience of firefighters

Paragraph 27 above is repeated.

31 Clause 20 can be invoked

31.1 This is a clause never utilised by the MFB or the UFU. The UFU, whenever it has a consultation dispute, invokes the Disputes Procedure and the status quo.[70] As examples, this occurred in relation to each of the following initiatives:

(a) Fireground Accountability List[71]

(b) Personal Internet Use[72]

(c) Windows 7[73]

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[65] O'Connell first statement MFB-25 at [122]
[66] O'Connell first statement MFB-25 at [151]
[67] O'Connell first statement MFB-25 at [119]
[68] O'Connell first statement MFB-25 at [100]-[117]. See also Appendix AA to these Submissions
[69] Rau reply statement MFB-8 at [71]
[70] See for example Mr Tisbury (BCOM member) at PN6459-PN6461
[71] David Youssef MFB- 14 Annexure DAY-11 pp 112 – 114
[72] Craig Lloyd MFB-17 Annexure CL-31 pp 46 – 50

(d) AirWatch[74]

(e) Transfer of appliance to Sunshine North[75]

(f) Loan of BA Pod to CFA[76]

(g) OWI-019[77]

(h) Teleboom replacement[78]

(i) Ringwood Fire Station[79]

(j) Eastern Hill refurbishment[80]

(k) Emergency Medical Response[81]

(l) MFB Policies[82]

31.2 This process was confirmed by the UFU President, Mr Hamilton, at transcript PN7555-transcript PN7558:

> *'I suggest that whenever the UFU has an issue or dispute about consultation, it raises a grievance and invokes the status quo?---The grievance is raised by a member or a body UFU on behalf of that member.*
>
> *Yes, so whenever the UFU, I would suggest, has an issue about - well, not whenever, generally I'll be a bit fairer about it, the UFU has an issue or dispute about consultation, it follows the process of raising a grievance which invokes clause 19 of the disputes procedure. Isn't that correct?---Yes.*
>
> *Generally, again, almost invariably, when a grievance is invoked, the UFU relies on clause 19.4 about the status quo, doesn't it?---Well, that's in the agreement, that's what applies, yes.*
>
> *Isn't the general practice then the UFU issues a bulletin to members saying a grievance has been issued and the status quo has been invoked, therefore they should not, because of the status quo, the situation has to remain as it is and, therefore, the MFB can't implement or do what it wants to do?---Well, it can do but we're informing the membership, yes.'*

31.3 Further, the process under clause 20 itself would just add another step in an already convoluted and unworkable process in any event.

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[73] Craig Lloyd MFB-17 Annexure CL-31 p241
[74] Craig Lloyd MFB-17 Annexure CL-36 p254
[75] Darren Davies MFB-31 Annexure DD-4 p 30
[76] Darren Davies MFB-31 p15
[77] Adam Dalrymple MFB-20 Annexure AD-4 p51
[78] Darren McQuade MFB-27 Annexure DM-2 p113
[79] Greg Pearson MFB-37 Annexure GP-18 p502
[80] Greg Pearson supplementary MFB-38 Annexure GJP-2 p12
[81] Peter Rau MFB-7, Annexure PR-8 p112
[82] Michael Werle MFB-35 Annexure MAW-13 p151

32 Effect of termination (consultation process)

32.1 In this mix, it should be noted that even some of the UFU witnesses saw consultation as the sharing of views per the Modern Award. As already mentioned, some conceded that bad outcomes arose from one party having a veto. See Mr Carter's evidence at transcript PN10934 – 10935:

> *You don't see a problem with consultation, that is the sharing of ideas? What about if one party had a veto, somebody could veto the MFB proceeding to place stations where it needed to place them?---That's probably a negative outcome.*
>
> *That's a bad outcome, isn't it?---Yes.*

32.2 Under cross examination, Mr Taylor also conceded that enterprise agreement provisions requiring MFB/UFU agreement had in the past produced bad outcomes for 'everybody'. Relevantly at transcript PN12158 – transcript PN12161:

> *'The position was an outcome. I think we agreed there was a significant problem identified in 2000. We've agreed on that. The MFB wanted a replacement uniform. We've agreed on that. A replacement ultimately was brought in in 2008 and rolled out by the end of 2009. That's correct, isn't it?---That's correct, yes.*
>
> *That's a very, very bad outcome for firefighters, firstly, isn't it?---I wasn't referring to that, Mr Parry.*
>
> *I am. It's a bad outcome for firefighters, isn't it?---The process – the quicker the process could've been expedited, the better.*
>
> *It's a bad outcome for firefighters, wasn't it?---It was a bad outcome for everybody.'*

32.3 Other problems with the consultation process include:

(a) delay, non-attendance, and failure to consider late material;[83]

(b) offensive and aggressive use of the veto power – the MFB will get 'jackshit';[84]

(c) the extended period when matters move between various committees - see for example the amount of time taken to introduce the simple flyer proposed by Firefighter Morris,[85] and the movement of the proposal through the committee process before full implementation. The issue was put to Mr Tisbury at transcript PN6809- transcript PN6856. Mr Tisbury concludes that in his view 6 months was not a long time to implement something relatively straightforward such as a 'flyer' for people to look after hydrants in their street. That cannot on any view objectively be seen as a good outcome or a reasonable process.

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[83] Pearce Exhibit MFB-29 at [71][74]
[84] Transcript PN7517 – Transcript PN7534
[85] Statement of Morris - Exhibit UFU-43

(d) the need to consult and agree on the most minor matters, such as the colour of a pencil. [86] In cross examination by Mr Wheelahan, both Mr Cleary and Mr Psaila agreed that if the MFB wanted to change the colour of a pencil, it would require the agreement of the UFU to do so. Mr Riley could not provide an answer to the question. See Riley at transcript PN10150 – transcript PN10152:

> *'That's why you have to consult about it, no matter - your position, in simple terms, is that every single change has to be consulted about, is it?---Yes.*
>
> *The colour of a pencil?---Just deciding.*
>
> *As long as the transcript shows a gap of a minute. Do you have an answer, Mr Riley?---No.'*

32.4 As to the effect on the employer there will likely be two significant effects:

(a) the MFB will be able to introduce changes after suitable consultation. Chief Officer Rau in his reply statement MFB-8 summarised the nature of the consultation that will take place following any termination at [42], [43] and [46]:

> *'A number of the UFU witness statements express a concern that if the Agreements are terminated, consultation will no longer take place. They also highlight the importance of consultation to enable employees to have input into matters such as equipment that they will be using on the fireground. The nature of work performed by the MFB means that the occupational health and safety of our employees is a primary concern. Consequently, in the event that the MFB is successful in its application to terminate the 2010 Operational Agreement, the MFB will continue to consult directly with affected employees, as contemplated by the OH&S Act and the Undertakings, on all aspects of their clothing and uniforms, equipment including PPC, station wear and appliances.*
>
> *Employees will not lose the means or the opportunity to provide their input and experience into each of these matters. Accordingly, there is no reason for the firefighters' concerns around their equipment, uniforms or PPC; it will, as it is today, be subject to a thorough and extensive consultation and testing process.*
>
> *The effect of the undertakings is that all decisions to introduce major changes in program, organisation, structure or technology that are likely to have significant effects on employees, and proposals to introduce changes to regular rosters or ordinary hours of work must undergo consultation through the formal Committee process, as well as directly with affected employees This does not prevent any other matter from being brought to the Consultative Committee process. However, such a step is not a requirement before implementation of any such 'other' proposal.*

(b) the current negative effects of the operation of the current regime will be ameliorated to some extent.

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[86] Transcript PN8511; Transcript PN8640; Transcript PN10151 to 10152

32.5 The appendices hereto deal with a number of examples of the problems caused by the Consultation process. These include:

(a) UFU interference in initiatives critical to firefighter and/or community health and safety, including:

(i) the deployment by the MFB of additional Emergency Medical Response services to the community to support Ambulance Victoria in the heatwave of January 2014 (**Appendix Y**)

(ii) Fireground Accountability Lists and FAST-card initiatives to assist the MFB understand the whereabouts of its firefighters engaged in emergency response at incidents (**Appendix CC**);

(iii) training for the use of the long duration breathing apparatus which would truly enable firefighters to understand their physiological limits, thereby protecting their health and safety in real life scenarios (**Appendix E**).

(b) UFU interference in the prerogative of the Chief Officer to deploy MFB resources as he sees fit, including:

(i) blocking the transfer of an appliance to Sunshine North to meet what the UFU had described as a community safety need (**Appendix T**);

(ii) blocking the loan of a breathing apparatus pod to the CFA so that it was available to recharge CFA breathing apparatus cylinders while its breathing apparatus van was being repaired (**Appendix L**);

(iii) preventing the commissioning of the Teleboom replacement with significant cost and operational implications to the MFB (**Appendix H**);

(iv) preventing a reduction in the number of appliances that attend bin fires on cost, efficiency and community safety grounds (**Appendix I**);

(c) UFU interference in station refurbishments and relocations including:

(i) blocking the refurbishment of Eastern Hill following prior agreement to proceed (**Appendix DD**);

(ii) preventing the relocation of Northcote fire station in accordance with the MFB Strategic Location Plan to meet response time targets for the protection of the community (**Appendix D**);

(d) UFU interference in policy initiatives including preventing:

(i) the introduction of a limit on personal internet use (**Appendix M**);

(ii) the roll-out of equal opportunity and bullying training;[87]

(iii) the formalisation of human resource procedures;[88]

32.6 In addition, the evidence is that the power of the UFU under the current consultation and dispute resolution provisions promotes a situation where employees communicate with the UFU as a first step, rather than the MFB as well as diverting time, energy and attention away from the MFB's primary focus on emergency response.[89]

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[87] Werle 1 MFB – 35 at [79] – [131]
[88] Werle 1 MFB – 35 at [10] – [78]
[89] Rau 1 MFB – 7 at [50] – [58]

32.7 The likely consequences of termination of the 2010 Agreements on the MFB (and others) in relation to the consultation procedure will therefore be:

(a) a more productive and efficient brigade;

(b) a brigade that is better placed to address community and firefighter health and safety needs in accordance with its statutory functions and obligations, including under the OHS Act and the MFB Act;

(c) a brigade that can reclaim the authority of its most senior officers. Senior officers and other employees with the responsibility and authority for making decisions will be able to do so without the requirement for endorsement by the UFU of each decision of the Consultative Committee and each recommendation of any subcommittee. On the evidence, this has included the critiquing of decisions of the most senior of MFB officers by the most junior of the UFU's industrial officers.[90]

(d) consultation processes and entitlements that no longer discriminate against firefighters who are not members of the UFU.

33 Changes to the Disputes Procedure

33.1 Clause 15 of the operational staff undertaking deals with a disputes procedure. Clause 10 of the ACFO undertaking deals with a dispute procedure.

33.2 The disputes procedures to be applied cover the broad range of matters subject to the dispute procedures in the 2010 Agreements (see clause 15.2 operational staff undertaking, clause 10.1 ACFO undertaking).

33.3 The various steps of the dispute resolution procedure internal to the MFB have been carried over from the 2010 Agreements. The MFB also consents to any process which would enable the dispute to be conciliated and/or arbitrated by the Commission.

33.4 Such a dispute procedure is a standard and common procedure in industrial instruments. Indeed there is no legislative or industrial requirement to include an arbitral power of the Commission in an industrial instrument.

33.5 In fact, under the Modern Award itself, it would appear that there is no right of the parties to have the Commission arbitrate a dispute, in the absence of their mutual agreement. On this matter the Modern Award provides as follows:

> *'9.3 The parties may agree on the process to be utilised by the Fair Work Commission including mediation, conciliation and consent arbitration.*

[90] See PN9937; PN9950–PN9979

9.4 Where the matter in dispute remains unresolved, the Fair Work Commission may exercise any method of dispute resolution permitted by the Act that it considers appropriate to ensure the settlement of the dispute.'

33.6 It can be seen that clause 9.4 permits the Commission to resolve a dispute using 'any method of dispute resolution permitted by the Act'. This may include mediation, conciliation, making a recommendation or expressing an opinion (see FW Act s 595(2)). For arbitration also to be an option, the Commission 'must be expressly authorised to do so in accordance with another provision of the FW Act' (s 592(3)). The effect of s 739(4) read together with 738(1) is that the Commission may only arbitrate a dispute under the Modern Award where the parties have so agreed.

33.7 Accordingly, the Undertakings provide a greater level of certainty in the right of the UFU to access arbitration, should it wish to do so, than does the Modern Award.

33.8 The Undertakings remove the power to have the status quo in place prior to the raising of any dispute maintained pending the resolution of the dispute.

33.9 The status quo power has been used extensively by the UFU. It is invoked in virtually every dispute or grievance raised by the UFU.[91]

33.10 The status quo power has often been used in disputes about consultation. The removal of the status quo power will not prevent or affect the consultation processes in the undertakings being followed. It may be that some of the considerations above as to the effect of removal of the veto are said to arise. The same submissions as above are made here. It is offensive and speculative to suggest that the MFB or its senior officers would proceed to implement a change having adverse effects on or putting at risk its firefighters' health and safety.

33.11 As to the effect on the MFB, the status quo power has been used to stop or hinder a broad range of operational and other initiatives as detailed above.

33.12 The evidence is that the current disputes procedure, in practical terms, has empowered the most junior industrial officers of the UFU to challenge and put a halt to operational decisions made by the most senior managers within the MFB. The extent to which Mr Marshall, Branch and National Secretary of the UFU, tests the bona fides of his industrial officers' decisions, one does not know (and will not know given his absence from the proceedings). In any event, both Mr Lee and Ms Krouskos have very little experience as industrial officers and no operational experience or fire fighting qualifications. Yet they apparently work 'collaboratively' with Mr Marshall to notify disputes, the effect of which is then to invoke the status quo. This means the operational change cannot be implemented unless the UFU agrees. See for example the evidence of Ms Krouskos regarding the grievance filed with respect to Mr Yousseff's

[91] Transcript PN 7632-7636

attempt to implement Fireground Accountability Lists, at transcript PN9880-transcript PN9888.

33.13 The practical operation of the 2010 Agreements must be considered a bad outcome for the MFB, firefighters and the community. Compare the qualifications and experience of Mr Youssef to that of Mr Lee and Ms Krouskos. Under the 2010 Agreements, Mr Youssef is in effect required to have Ms Krouskos, Mr Lee and Mr Marshall agree with any decision he makes to implement change – including operational decisions. The evidence discloses that industrial officers with no experience are in fact drafting operational work procedures in the confines of the dispute resolution process: see transcript PN9929 – transcript PN9942.

33.14 The 2010 Agreements have placed in Ms Krouskos an ill-founded belief that she is qualified to critique operational work instructions. The evidence of Ms Krouskos is extraordinary - at transcript PN9950-transcript PN9979:

> *It's a bit more than that. If you turn to paragraph 88, it seems you have now - and listen to my question carefully please - you have referring to Mr Youssef's statement, 'I do not accept that the current version of the instruction is unworkable or that procedures were being made up each day in place of the instruction.' Now, you're there expressing an opinion about an operational work instruction, aren't you?---Yes.*
>
> *You're simply not qualified to express any such opinion whatsoever?---I disagree.*
>
> *You have already accepted you've got no operational experience at all. Correct?*
>
> *---Yes.*
>
> *And you've already accepted it was Mr Casey Lee and Mr Williams who drafted an agreed document updating the operational work instruction. Correct?---The first version, yes.*
>
> *And you had nothing to do with updating or drafting operational work instructions. Correct?---No, not correct.*
>
> *If you did, you certainly weren't qualified to do so. Correct?---Not correct.*
>
> *Can I suggest to you again that if one is to determine whether the operational work construction is, as you've set out, unworkable or not, that Mr Youssef is far more eminently qualified to express his opinion than you?---I don't accept that.*

And further at transcript PN9991:

> *Well, don't you think that Mr Youssef's assessment of the Hazelwood fires and this operational word instruction again that he's placed in a better position to give an opinion than you to this commission?---I don't agree.*

33.15 The lodging of a Dispute cannot overcome the effect of the requirements for agreement given the terms of the 2010 Agreements. See section 739(4) and (5) of the FW Act:

'(4) If, in accordance with the term, the parties have agreed that the FWC may arbitrate (however described) the dispute, the FWC may do so.

(5) Despite subsection (4), the FWC must not make a decision that is inconsistent with this Act, or a fair work instrument that applies to the parties.'

33.16 That is, the 2010 Agreements contain a range of matters that require UFU agreement prior to effecting any change, including the consultation process, changes to uniforms, equipment and appliances, relocations (see Pearce Statement MFB-29 at[13]). The Commission can not require the agreement of the parties, nor can it arbitrate an outcome where the parties have been unable to agree the matter between themselves.

33.17 The removal of the status quo provisions will not impact the vast majority of firefighters. Disputes can still be raised and taken through a procedure. If not resolved, the Commission can arbitrate an outcome.

33.18 That the status quo provisions are not available will have a positive effect on the MFB and its operations, as well as the community and other fire services such as the CFA:

(a) operational decisions that the Senior management deem in the best interests of the MFB, the community and firefighters can be made and implemented;

(b) normal managerial decision such as internet access and equal opportunity training can be made and implemented.

(c) events, including in collaboration with the CFA and other fire services, can proceed.

34 Changes to the Staffing Chart

34.1 Clauses 33 and 36 of, and Schedule 2 to, the Operational Staff Agreement mandate what the agreement terms as 'safe staffing levels', which include a minimum number of 270 operational employees per shift (in addition to a minimum number of day workers), consisting of particular rank ratios and manning appliances according to locations set out in Schedule 2. As noted by Chief Officer Rau in his first statement MFB-7 at [34]:

> *'The provisions in the 2010 Operational Agreement are prescriptive at two levels. At the first level, the MFB is required to maintain a minimum number of 270 firefighters on every shift. At the second level, there is prescription as to the identity of each of these firefighters, so that on every shift, the MFB must have pre-determined numbers of firefighters at various ranks attached in pre-determined numbers to pre-determined numbers of appliances. It prevents the Chief, who is the accountable person under statute, from being able to implement a system that is matched to the identified risk profile at any given time. The obligations to determine the risk sit with the Chief Officer.'*

34.2 Following any termination of the Operational Staff Agreement, the MFB will no longer be bound to maintain these minimum staffing requirements through recall and retain

arrangements, or location constraints - a 'default position' which 'eliminates the need for thinking' (MFB-7 at [37]).

34.3 The MFB will nevertheless continue existing rostering practices as follows (reply statement of Chief Officer Rau (MFB-8, at [23]-[27]):

> *'In the event that the MFB is successful in its application to terminate the Agreements, the MFB will continue to employ and roster for duty exactly the same number of firefighters as it does today, i.e. there will continue to be at least 300 firefighters per platoon rostered for duty on each shift.*
>
> *The requirement to roster to a prescribed number of firefighters per shift is not something that the MFB would agree to in any future enterprise agreement.*
>
> *Firefighters will continue to be rostered across the MFB's 47 fire stations on the 10/14 roster system. Firefighters' ability to maintain a work/life balance and the certainty which comes with having a pre-determined roster will not change.*
>
> *The numbers of firefighters assigned to appliances will not be decreased.*
>
> *Provisions which reflect these matters are set out and maintained in the undertaking.'*

34.4 Consistent with the evidence of Chief Officer in Rau MFB-7, termination will, however, enable the MFB to 'take a more flexible and holistic approach to the issue of minimum crewing to ensure that it appropriately reflects community risk (at various times) and community expectation'. It will enable a 'best practice approach' which 'encourages interoperability and a coordinated sector-wide approach to emergency management' (MFB-7 at [37]).

34.5 The MFB will achieve this through the following means (Rau reply MFB-8 at [28] to [41]):

> *'What will change in the event of a successful application to terminate the Agreements is how the MFB sets and maintains its emergency response capability through the allocation of resources.*
>
> *What this means in practice is that the MFB will adopt a risk-based approach to the number of firefighters and appliances required, and will not be bound by the requirement in the current 2010 Operational Agreement that the MFB maintain a minimum of 269 (increased to 270) firefighters on duty in the MD, irrespective of anticipated or known risk and demand for our emergency response services.*
>
> *The number of 270 firefighters is based on the assumption that risk and demand for emergency response services is the same on every day of the year. This is simply not true. As an example, risk and demand for emergency response services varies across seasons, weather patterns and time of day, and is lower over weekends and after business hours.*
>
> *Since the events of 7 February 2009 (Black Saturday), there has been considerable change in the emergency management sector, including a more integrated approach to emergency response management with other*

emergency services. It is recognised that the traditional fire seasons are longer and hotter, with more very hot days overall.

At the same time, the MFB is increasingly being called upon to contribute greater resources across Victoria during major incidents, particularly during the fire season. This requires the MFB to have the ability to quickly scale up and down its resources to meet anticipated risk and emergency response demands. The new era in emergency management requires a more agile response from all emergency management partners.

The MFB's approach following any termination of the 2010 Operational Agreement will be to allocate resources in accordance with the anticipated risk and demand. Where anticipated (and actual) risk and demand for emergency response services is high the MFB will increase the number of firefighters and appliances. Where anticipated risk and demand for emergency response services is low, the MFB may decrease the number of firefighters and appliances, based on a number of operational factors. However, a risk and demand system will not in any way affect the operation or safety of firefighters on the fireground. This is because the GARS system will still operate, as it does today, to ensure that specific levels of response are met with the required number and types of appliances. This means there will not be the uncertainty of response on the fireground as claimed by many of the UFU witnesses.

The Chief Officer and the Deputy Chief Officers will assess and determine anticipated emergency response requirements based on a variety of factors, including:

(i) State Control Team assessment of risk and required state preparedness levels;

(ii) Major fire or incident activity;

(iii) Historic demand for emergency services. This is based on historical analysis by hour, day, week and month over the previous three years;

(iv) State preparedness levels;

(v) Fire risk ratings;

(vi) Environmental considerations, e.g. fire on landscape, marine pollution;

(vii) Any public events which are taking place, e.g. mass gatherings, festivals;

(viii) Medical emergencies, e.g. heat waves, pandemics;

(ix) Requests for assistance by other agencies or States;

(x) Security threats;

(xi) Long duration incidents;

(xii) Utilities (e.g. major disruption);

(xiii) Population movements, e.g. in and out of the CBD; and

(xiv) Transport infrastructure failures (e.g. road, rail, aviation).

The preparedness level for the MFB will be set on a weekly basis and will occur directly after the State Control Team meeting. The anticipated risk and demand, and the consequent required allocation of resources, i.e. how many

appliances and firefighters are required, will be communicated and implemented on a weekly basis and reviewed throughout each shift.

Whatever the level of anticipated risk and demand I will ensure, as Chief Officer, that the MFB at all times has in place appropriate numbers of firefighters and appliances to ensure that emergency response standards of 7.7 minutes to structure fires, and 9.2 minutes to Emergency Medical Response incidents are maintained for 90 percent of those incidents.

When anticipated risk and demand within the MD is low, our data demonstrates that the MFB is easily able to maintain this response capability with fewer firefighters and appliances than currently required by the 2010 Operational Agreement with no impact on firefighter or community safety. Our data from September 2010 to September 2013, illustrates that the average yearly utilisation of primary appliances (excluding specialist appliances) for emergency response per day across the period was less than 5%. Firefighters will not be recalled and retained in the automatic manner that they are today where it is deemed by the Chief Officer that the anticipated risk and demand is low. Firefighters on duty when anticipated risk and demand is low may also be utilised in other activities, such as training or community education and awareness programs.

Where anticipated risk and demand is high, additional firefighters and appliances may be called up. The MFB's risk-based approach will result in more resources being available when the community needs them most.

Where major fires occur the Emergency Services Commissioner Victoria has the authority to determine overall control and direction of response activities from any one or more of the fire services agencies, including the MFB, the CFA and DEPI. This authority arises from the Emergency Management Act 1986 and the Emergency Management Act 2013.

In such circumstances, the MFB will commit resources including firefighters, fire trucks and command staff across Victoria in an 'all hazards, all agencies' response to all major incidents requiring our assistance across agencies.

The MFB will maintain resources at levels which will ensure emergency response coverage across the MD. This is consistent with Victoria's overall 'whole of government' emergency management capability. At the moment the 2010 Operational Agreement impedes this capability.'

34.6 Acting ACFO Jugum's evidence was that the MFB has been developing an MFB Operational Readiness Chart Summary (MFB-9) and that at transcript PN3904 – transcript PN3907:

> *'Now, to go to the Operational Readiness Chart Summary document, the first document, what is that document, Mr Jugum?---That document is basically an overview of how the MFB might align its resource preparedness level to what the state preparedness levels are. So you can see on the left-hand side of that document there's a preparedness levels from zero through to six. They align with the state preparedness levels that the state control centre determine from time to time on a weekly basis generally. They'll determine those - or a daily basis during the fire season - and the operational readiness numbers reflect what the MFB's position is in terms of those different levels and also*

we've got another column there, the 1014 operational crewing number, which is also reflected in relationship to those preparedness levels.

And the Resource Implication, what's under that heading?---The resource implication really is a bit of a note in terms of what resources the MFB requires to have stood up in preparedness. So you can see, for example, at level 4, for example, the orange level in the middle there, 14 senior command staff, one fire service communication controller, 67 primary appliances and 15 specialist appliances. In fact, that's the level that we have today every day, so that's an example of what the resource implication is to the organisation. And then there's another column there for guidance and that's really guidance meant to inform the senior operational command as to what the implication means for the organisation. So it's there to assist in the interpretation of the chart.

THE COMMISSIONER: I think I missed what you said about the number you have each day, every day. What was that detail?---The number that we have each day? The detail is that level 4 in the chart corresponds to what the operational minimum crewing chart is presently today.

MR PARRY: Right, now, this chart, who prepared that?---The chart was prepared by the MFB, in particular the project, the enterprise agreement project team prepared the chart in consultation with senior operational command including the deputies, the chief and a few other people for operational input. It was prepared based on knowledge of what the state requirements were, what the preparedness levels were and it was informed also by the data that we've seen in the other charts, the utilisation data, that's been presented previously.'

34.7 In answer to Mr Walker's opinions about the Operational Readiness Chart, Mr Jugum noted that Mr Walker's evidence was somewhat dated and did not take into account the requirements imposed by the *Emergency Management Act 2013*. At transcript PN4122 he said:

'He gave some evidence about the current state of the emergency plans and their development. Do you want to comment with regard to that evidence, regarding where emergency plans in Victoria stands as of today and how the MFB relates to that?---Yes, the evidence that Mr Walker gave seemed a bit dated. This plan was really something that came out of the Ash Wednesday fires. Since then there's been quite an evolution of emergency management in Victoria, particularly after the Black Saturday fires, we had the bushfires royal commission and there was a number of recommendations that came out of that which led to, I believe in late 2012, led to the white paper. So the government put a document that said, 'This is what we are considering in terms of reforming the emergency management sector in Victoria and at it's basis it was more about a joined up approach to emergency management and also recognising that emergency management wasn't just about bushfire, it was the whole gamut of emergency and took into account all sorts of things; storm tempest, you know, flood, medical emergencies. All of those things that typically are involved in the emergency management sector. As a result of that there was legislation that came out and that was the new Emergency Management Act 2013 which was enacted on 1 July this year, and prior to that there had been, as a result of the bushfires royal commission, the Fire Service Commissioners Act. The Emergency Management Act, when that came into

effect, the Fire Service Commissioners Act was repealed and as a result of that Emergency Management Victoria Act, the state emergency management plan has recently been updated as well. So that makes up part of the Emergency Management Victoria arrangements for emergencies, and what that means for the MFB, for the organisation, is that we are committed to a sector approach, that's an all agencies, all hazards approach to managing emergencies and responding to emergencies. It gives wide ranging powers to the emergency management commissioner, formerly the fire service commissioner, for the allocation of resources across the state in relation to all emergencies. It also specifies the types of emergencies that he has control over and major fires or class 1 and class 2 fires are typically the larger end of the scale, things that impact a broad area or have a particular significance, there might be critical infrastructure involved or those sorts of things. So the end result of all that is a joined up approach where the metropolitan district, formerly the MFD, the MD is no longer seen as an island, it's part of a state, and the resources within that metropolitan district belong to the state and they're part of the state's overall capability to deal with emergency management issues.'

34.8 Of note was Mr Jugum's evidence about the lowest risk level – zero: at transcript PN 4127 he said:

> *Now, it's - and Mr Walker was particularly taken to state preparedness level zero and asked questions about the removal of eight water tankers, and he had some views about the effects on the ability of the MFB to respond. What do you say to his comments about the removal of water tankers?---I would say that the preparedness level reflects the anticipated demand and risk level for the particular day or week, or whatever period that preparedness level is set. Within that period of course you can have major events. The MFB has a large capacity to respond to large events. As part of that response, as I mentioned earlier, there's 151 primary appliances within 15 K's of our boundary which can augment that response if required.*

34.9 The same response applies to Mr Walker's concerns at transcript PN4023 that:

> *'I'm not quite sure how you'd use this preparedness level to determine on a day-to-day basis something that occurred such as Coode Island or a Lombard's fire or Westmead's HAZMAT incident that went for nearly two weeks. You can't use this as the assessment of how that and when that is likely to occur.'*

34.10 Such longer term incidents may also, of course, lead to an upgrading of the preparedness level. Other options available to the MFB include (Rau MFB-7 at [40):

> *'cancelling a training course and temporarily moving day workers to a station position, however, under the current arrangements the Chief Officer cannot determine that having regard to the current risk profile, having numbers under 270 does not pose an unacceptable risk to the community.'*

34.11 This also addresses ACFO Brown's concern (at transcript PN5472) that there is no 'crystal ball' when it comes to emergency incidents.

34.12 The UFU's first witness, who was apparently called to critique the approach of the MFB, Mr Walker at (transcript PN5284) agreed that:

> *'Removing 269 does not compromise public safety, rather provides flexibility and the MFB can provide numerous examples where for various reasons the minimum was not complied with without industrial disputation.'*

34.13 The fixed minimum number is as a result of bargaining. The number has not always been 270. Mr Walker's evidence (the first witness for the UFU and an employee involved in the development of GARS (transcript PN3961)) was that in substance there was no magic in the minimum number required for crewing. Indeed, he went further and accepted his earlier criticisms of the prescribed minimum number (transcript PN5277 – transcript PN5286). In reference to comments made in 2011 (MFB-44), he said as follows:

> *'It goes on, and on page 41 it gets to ACO Walker about a third of the way down the page, 'ACO Walker notes in his interview that the current prescriptive crewing chart is the catalyst for the MFB's lack of ability to have flexibility in deployment resources.' Do you accept you said that at the time, or words to that effect?---Words to that effect, yes.*
>
> *You believed that then?---Yes.*
>
> *Believe that now?---Yes,*
>
> *He went on, it quotes you and says, 'Michael summarises this view' - I'll leave out - 'similar to that of Bouchie' - 'in stating that the current EBA provides that if the number available on shift firefighters falls below 269, off-duty firefighters must be recalled to duty to make up that number.' That was the position, so I assume you don't dispute that?---No, that's correct, and it still is the position.*
>
> *There's then reference to the EBA having an annexure and that's describing the position. In the bottom paragraph, it reads, 'Michael further adds that there is no magic in the number of 269.' Right. Can we accept that you said words to that effect?---Words to that effect, yes.*
>
> *That was your belief then?---Yes.*
>
> *And remains your belief?---Yes.*
>
> *To continue on, 'In recent EBAs the number was 248, and prior to that there was no specified minimum. Removing 269 does not compromise public safety, rather provides flexibility and the MFB can provide numerous examples where for various reasons the minimum was not complied with without industrial disputation.' Again, you said words to that effect to Mr Dalyrmple in this interview?---Correct.*
>
> *You believed that then?---Yes.*
>
> *You believe it still?---Yes.'*

34.14 As noted by Chief Officer Rau (first statement MFB-7 at [35]):

> *'While the numbers around ratio and staffing levels may be of historic significance, they are not, to my knowledge, based on any recent assessment of organisational need or community risk and, particularly in the context of a*

state based approach to emergency management, any further planning must be cognisant of state capacity in an holistic sense. Within the new emergency management environment the model requires revisiting.'

34.15 The evidence of the UFU's first witness supports this position.

34.16 Importantly, Mr Walker has not been involved in the development of the Operational Readiness Chart. To be fair to him, he has been off on sick leave for much of the last three years (transcript PN5135 – 5140).

34.17 That three years has seen a number of significant developments in this area, not least being the Emergency Management legislation. Some other UFU witnesses were asked in evidence in chief about the Chart and minimum staffing. None had been involved in the development of the Chart and only had generally seen the document on the day of their evidence. Their opinions, again to be fair to them, amounted to speculation about the possible consequences of not having enough staff in the case of a major emergency. As Mr Jugum identified above, the MFB has a large capacity to respond to such events.

34.18 In any event, the position of the MFB based on the evidence above, is that the removal of the staffing chart will have no real effect on any firefighters or the community.

34.19 This is supported by the MFB's appliance utilisation data at MFB-9, which shows that average appliance utilisation is under 5% (transcript PN 673) and, in some weeks, utilisation of particular appliances can be as low as 0-1%. This is not a desirable situation. As Chief Officer Rau notes (MFB-7 at [38]):

'In my opinion, there is an outdated view that if a fire station is without a truck for a period in excess of 30 minutes it must be backfilled, because appliances should be sitting in stations. In my view, stations being empty is not necessarily a bad thing - it means that our firefighters are out protecting the community. As an example, on February 9 2014, which was a day of significant fire weather, a large number of fire stations were empty, as firefighters and appliances were out at incidents. It was a busy day so I believe that the community would expect that some stations would be empty. The important thing to note is that this occurred without any adverse consequence to the community.'

34.20 Appropriate numbers will still be rostered and sent to emergencies. In fact, the evidence is that the same numbers will be rostered and sent to emergencies as occurs presently. GARS will not change. There is no proper basis to make any finding that having less people on shift on some days assessed as low risk will have any likely effect on any firefighter or the community.

34.21 It may be said by the UFU, based on its primary submissions that the effect of removing the staffing chart will:

(a) undermine the position of incident controllers because they will not know how many or what appliances are at an event;

(b) mean less appliances or inappropriate appliances attend, at least as a second vehicle;

(c) create risk if a major emergency occurs such as a plane landing on the MCG on a Saturday afternoon (transcript PN 10557) or another, or even multiple, major events occur and there are insufficient firefighters or appliances to attFend;

(d) leave matters to the discretion of senior officers.

34.22 As to these matters:

(a) The nearest appliances will still be called out as per the CAD system, and GARS will ensure the appropriate number and type attend. Incident controllers are trained to make assessments in accordance with their comprehensive training. It is not the position now that all appliances turn up on time, it is inevitably the right appliance or that there are 4 firefighters on an appliance – sometimes there are 3. Incident controllers deal with such variables. It is an exaggerated assertion to suggest their position will be changed;

(b) it is speculation in the extreme to suggest that less or inappropriate appliances will turn up. This arose out of a suggestion by Mr Brown about the need to have water tankers at certain events rather than pumper tankers (transcript PN5531, PN5537). Mr Brown suggested that, despite the fact that the MFB has determined that pumper tankers are a suitable replacement for water tankers, this is not in fact the case. The logic that followed was that removal of existing water tankers from the system on a low risk day may therefore create a risk to both firefighters and the community. The fact is that water tankers are seen by all as interchangeable with pumper tankers. The UFU, in the Consultative Committee, endorsed a proposal to replace all MFB water tankers with pumper tankers (MFB-45, transcript PN5987-PN6007). This followed wide consultation with employees, and was endorsed by the UFU in what was a (relatively) quick consultation process under the Operational Staff Agreement (Brown, transcript PN6012).

(c) However, the Fire Services and manning and equipping thereof is a matter of risk assessment. The risk of major emergencies is low. Resourcing of a fire service must take that into account. However, as Mr Jugum said at PN 3905, there are still a lot of primary appliances and firefighters around;

(d) As to the discretion of senior officers, it is the position now that these are decisions of the Chief Officer that are his statutory responsibility and which he

can delegate to other officers in the MFB. It is the responsibility of senior officers to make such decisions and exercise such discretions.

34.23 The MFB should be able to staff to a level that meets the risk as it assesses it. It should be able to place stations where it wants, to meet the risks as assessed by the MFB.[92] It should not have to recall firefighters it determines it does not need to meet the as assessed by it. That will have the effect of the MFB productively and efficiently meeting its statutory obligations.

34.24 The Chief Officer (acting on appropriate information) is best placed to assess the risk and make decisions around resourcing accordingly.[93] It is the Chief Officer who is accountable if things go wrong. Yet the 2010 Operational Agreement severely limits his power to make decisions on these important aspects of emergency response.[94]

34.25 In any event, on the basis of the CFA Decision, clauses that prescribe minimum numbers of required employees are inconsistent with the implied limitation in Re AEU. That means the obligations in the 2010 Agreement are void.

35 Agreement on appliances / equipment

35.1 The Operational Staff Agreement provides in Clause 88.1 as follows:

> ***'88. UNIFORMS AND EQUIPMENT***
>
> *88.1. The MFESB and UFU must agree on all aspects of the:*
>
> *88.1.1. articles of clothing;*
>
> *88.1.2. equipment, including personal protective equipment;*
>
> *88.1.3. station wear; and88.1.4. appliances;*
>
> *to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'*

35.2 Clause 73 of the operational staff undertaking relevantly proposes that:

> *'73.1 The MFB will consult on all aspects of the following, to the extent that any change is major change with significant effects on Employees, in accordance with clause 10:*
>
> *(a) articles of clothing;*
>
> *(b) equipment, including personal protective equipment;*
>
> *(c) station wear; and*
>
> *(d) appliances;*

---

[92] The importance of the geographical location of fire stations, determined using 'a comprehensive process based on significant risk overlays to determine where best to locate fire stations to equitably and adequately' risk profile, which is 'not a static process but a dynamic one' (Walker, UFU-3 at [22])
[93] First statement Rau MFB-7 at 42
[94] First statement Rau MFB-7 at 42

to be used or worn by Employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.

73.2 To the extent that the proposed change is not a major change with significant effects on Employees, the MFB will consult with affected Employees. The MFB may choose to refer such a matter to the Committee or another body at its discretion.'

35.3 Clause 88 of the Operational Staff Agreement is a most significant power in the hands of the UFU and arguably employees.

35.4 As with the consultation process, both legally and practically, the UFU has a veto power over any decision to introduce new appliances, equipment, articles of clothing or uniforms. The veto power is dealt with in detail above. Unlike with the consultation process, there has been no suggestion by the UFU that arbitration or clause 20.2 of the Operational Staff Agreement are available courses when the UFU refuses its agreement under clause 88, or other like provisions of the Operational Staff Agreement.

35.5 The requirement for agreement under clause 88 has resulted in many bad outcomes for the MFB, its employees and the community. The experience of the MFB in respect of a range of matters in evidence, including the introduction of new personal protective clothing (**PPC**) discussed below; the ongoing inability to commission the Teleboom replacement (**Appendix K**) and Ladder Platforms (**Appendix R**) and the delays experienced in commissioning equipment even when the UFU allows commissioning to proceed is testament to this.

35.6 Further, from a fair reading of the Appendicies to this Submission, and the evidence as a whole, it is apparent that many of the behaviours, attitudes and tactics of the UFU identified by the Judge, continue to be engaged in by the UFU.

36 Lewis Report (MFB-14 at tab DAY-44).

36.1 In around the year 2000, the MFB and firefighters were aware there were significant problems with the brigade's PPC. Both the CFA and the MFB sought replacement PPC and proceeded with a joint tender. Initial estimates in May 2002 were that the contract with the successful tenderer would be in place by May 2003. The Lewis Report noted that whilst the estimate was ambitious, at that time it would have been reasonable to expect the contract to be in place early in 2004 with the cooperation of all parties.

36.2 On 12 October 2007, there was an incident involving an MFB firefighter where he was burnt. Much of the blame was attributed to the protective clothing he was wearing (transcript PN5843 – PN5844).

36.3 On 25 October 2007, the then Minister for Police and Emergency Services, Mr Bob Cameron MP, instructed Judge Lewis to provide him with a report on the processes to select new PPC worn by firefighters in Victoria. The letter of instruction is appended to

exhibit MFB–14, at Tab DAY–44. In relevant part, it briefly set out the background as follows:

> *'Discussions between parties developed an agreed performance specification for personal protective clothing (namely the structural ensemble) for firefighters in 2002. In October 2006 agreement was reached on how to progress the choice of the structural ensemble, leading to announcements by the Country Fire Authority and Metropolitan Fire and Emergency Services Board in October 2007 that a decision had been made. Arrangements are now in place for the manufacture and supply of the new equipment. The significant delay between 2002 and 2007 suggests that the reason for delay need to be identified so that delays of this magnitude can be avoided in the future.'*

36.4 Judge Lewis published his report dated 28 February 2008. A full analysis of this report is set out in **Appendix FF**.

36.5 The relevant findings of the Lewis Report were put to Mr Brown at transcript PN5854 and onwards and to Mr Taylor commencing transcript PN12032.

36.6 In relevant part, the findings of Judge Lewis were critical of the processes undertaken by virtue of the MFB/UFU enterprise agreements. In particular, the requirement for the parties to agree to any change. At page 6 of the Lewis Report, Judge Lewis recommended that clauses in the agreement requiring union agreement before implementing change to uniforms be amended to in substance remove the UFU's veto power. Judge Lewis recommended at page 6:

> *'1.3-EBA*
>
> *The first paragraph of clause 47 'Uniforms and Equipment' in CFA Enterprise Bargaining Agreement (CFA EBA) requires the CFA and the UFU to reach agreement on the clothing and equipment to be worn and used by employees. The third paragraph of Clause 47 requires the agreement of the CFA and UFU you on the specifications of replacement Personal Protective Equipment and Station Wear and plan of distribution of clothing.*
>
> *I recommend that in any future EBA entered into between the CFA and the UFU, in the corresponding clause the first paragraph should be amended to read*
>
> *The employer shall supply each employee and be responsible for the cost of replacing, repairing and or cleaning the articles of clothing and all equipment which the employer decides must be worn and/or used by the employee, after consultation with the union.*
>
> *There is no need to amend the second paragraph or to retain the third paragraph.*
>
> ***I recommend that similar changes be made in any further EBA entered into between the MFESB and UFU after the present Workplace Relations Agreement expires on 19 April 2009.***
>
> *In making those recommendations, I am of the view that in relation to negotiations between the CFA and UFU, the UFU has consistently taken advantage of the wording of the clause as it presently stands, to achieve, in*

effect, a veto of any attempt by the CFA to improve clothing and equipment issued to employees, with which the UFU does not agree.'

36.7 Judge Lewis also noted that the CFA EBA had a number of other clauses that required UFU agreement before the implementation of change, in respect of which he said 'my comments above are equally applicable to those clauses' (at p7).

36.8 It is extraordinary that members of the UFU BCOM and other senior UFU officials have not even read the Lewis Report, let alone taken any positive step to implement any of the recommendations of Judge Lewis - see:

(a) Mr Brown at transcript PN5828:

'Surely you've read the Lewis report?---I haven't read the Lewis report completely, no.'

(b) Mr Angwin at transcript PN7820-transcript PN7822:

'Let me put it this way: you know of the Lewis report, do you, Judge Lewis report?---I know of it but I don't know it.

Know of it?---Yes.

Have you ever read it?---No.'

(c) Mr Ward at transcript PN7891:

'In 2008 a report was prepared by Lewis J on delays with regard to the completion of the obtaining of new clothing and equipment. Were you aware of that report?

---I'm aware of it but I haven't read it.'

(d) Mr Cleary at transcript PN8497-transcript PN8499:

'You disagree with that. Now, at paragraph 51 you deal with the topic of the uniform subcommittee and you deal with PPE, and at subparagraph (d) - and I'll just read towards the end the statement, 'The consultation within this committee achieved great outcomes and our PPE was designed, manufactured and ultimately delivered with best-case scenario protection being met.' Now, can I ask you are you aware that Judge Gordon Lewis, he has produced a report on the process to select new personal protective clothing for Victorian firefighters in 28 February 2008?---I'm aware of that.

Have you read that report?---No.

No. Were you a member of BCOM - sorry, withdraw that. When were you first a member of BCOM?---Around about 2001.'

36.9 The Lewis Report was put to Mr Taylor – the UFU representative involved in the attempts by the MFB and CFA to tender for and obtain new PPC in the 2000s.

36.10 In his evidence in chief, Mr Taylor said that did not agree with the criticisms in the Lewis report – transcript PN11596:

'Did you agree with the criticisms which the Judge made? --- No, I didn't.'

36.11 However, when Mr Parry QC put the content of the report to him, Mr Taylor basically agreed with the facts found by Judge Lewis and in the end, Mr Taylor also conceded that the delayed process was a very bad outcome for firefighters, the community; everybody.[95]

> *That's a very, very bad outcome for firefighters, firstly, isn't it?---I wasn't referring to that, Mr Parry.*
>
> *I am. It's a bad outcome for firefighters, isn't it?---The process – the quicker the process could've been expedited, the better.*
>
> *It's a bad outcome for firefighters, wasn't it?---It was a bad outcome for everybody.*
>
> *It was a bad outcome for the community as well, wasn't it?---Well, I can't reflect on it. Is it about outcome for the community? I don't know.*
>
> *You're an emergency service worker and you're asking, 'Is it about outcomes for the community'?---I know it's a bad – it was a delayed outcome for firefighters because they didn't have protective clothing that met a standard for a lot longer than they should've had.*

36.12 In circumstances where Mr Brown gave evidence of a firefighter being burned in late 2007 and much of the blame being attributed to the protective clothing he was wearing (transcript PN5843-PN5844), it is astonishing that senior members of the UFU BCOM did not even read the Lewis Report nor indeed take steps to implement the Judge's recommendations. The worst potential outcomes of the delay in implementing new PPC in the early 2000s are obvious. This was a delay for which the UFU seemingly takes no responsibility, despite the scathing criticisms in the Lewis Report.

36.13 No one seemed to know the reason for the lack of participation.[96]

36.14 It appears only Mr Marshall knows the reason for this and, again, his lack of evidence is startling in such an important matter.

36.15 It is also astonishing that the UFU chose not to participate in the Judge's enquiry into the delay over the introduction of new PPC.

36.16 In all the circumstances, the end result was bad and in significant part was found to have been caused by the conduct of the UFU, which was empowered with a right of veto under the relevant enterprise agreements. As Judge Lewis found; the UFU had a policy of obstruction until it achieved what it wanted. Further:

> *'From the outset, the UFU took a product-based approach to the specification of the requirements while the agencies took a performance-based approach. The issue of a performance based specification compared to a product-based*

---

[95] Transcript PN12032 to Transcript PN 12163: At Transcript PN12158-Transcript PN12162
[96] See for example Brown at PN5866, Hamilton at PN7642

specification was never fully resolved. The failure to reach agreement on the specification was an underlying cause of delay.'

and at page 37:

'The UFU used clause 47[97] *as the basis for a number of applications to the AIRC, including alleging unsatisfactory consultative procedures and objecting to volunteer involvement on the committee. The UFU used clause 47 to justify its overall obstruction of the tendering process, unless it resulted in the selection of PBI Gold.'*

36.17 The tactics used by the UFU to advance their position in large part reliant on the processes in the EBA are set out in Part 5.3 and 5.4 of the Lewis Report (pages 329-331 of the Exhibit). These included:

(a) allegations of unsatisfactory consultative procedures which led to applications to the AIRC;

(b) refusal to participate in the tendering process;

(c) use of OH&S and EBA processes;

(d) lack of attendance at meetings;

(e) media releases critical of the processes and senior management;

(f) banning members from participating in trials.

36.18 As the Judge concluded after considering the 'Present and Immediate future'...said... 'and so the chaos continues' (Part 4.4 page 322).

36.19 The Judge was prescient with such an observation.

36.20 Further to the above, in all the circumstances and particularly given the Judge's findings, there is a clear inference open that the UFU took the deliberate decision not to involve itself or assist the inquiry because:

(a) it knew there were going to be findings critical of the UFU and their real contribution to the delay;

(b) it wanted to be able to distance itself from and disagree with any Report coming out of the Inquiry;

(c) it wanted to be able to ignore the Report and take no notice of any of the findings or recommendations contained therein.

36.21 The ignorance of the BCOM members and the absence of Mr Marshall from these proceedings makes that inference easy to draw. Indeed it is the only logical inference. In any normal organisation, raising such an issue as indefensible delays in the obtaining of something as fundamental to fighfighter safety as PPC, the governing committee or Board would insist on co-operation with such an inquiry, provide all evidence and explanation it was able to, and do what it could to avoid a repetition, including by implementing any recommendations. The UFU did none of this. It has ignored both the

[97] Although there is reference to clause 47 of the CFA EBA–note that the tender was a joint tender with the MFB

Inquiry and the Report. The UFU's attitude deserves real condemnation. It shows that the attitude to this power of veto over equipment and appliances identified is ongoing. Mr Marshall remains the Secretary.

37 Effect of termination

37.1 The effect of termination on the MFB will be that it will enable it to introduce appropriate appliances, equipment etc after consultation with the employees and their representatives. As stated by Chief Officer Rau in his reply statement MFB-8 at [42]-[47]:

> *'The nature of work performed by the MFB means that the occupational health and safety of our employees is a primary concern. Consequently, in the event that the MFB is successful in its application to terminate the 2010 Operational Agreement, the MFB will continue to consult directly with affected employees, as contemplated by the OH&S Act and the Undertakings, on all aspects of their clothing and uniforms, equipment including PPC, station wear and appliances.*
>
> *Employees will not lose the means or the opportunity to provide their input and experience into each of these matters. Accordingly, there is no reason for the firefighters' concerns around their equipment, uniforms or PPC; it will, as it is today, be subject to a thorough and extensive consultation and testing process.*
>
> *The MFB accepts that consultation with employees and their representatives is appropriate in a number of circumstances.*
>
> *However, the MFB will not concede in any new enterprise agreement that all (or any) proposals require the agreement of UFU representatives or individual employees before a final decision to implement any change can be made.*
>
> *The effect of the undertakings is that all decisions to introduce major changes in program, organisation, structure or technology that are likely to have significant effects on employees, and proposals to introduce changes to regular rosters or ordinary hours of work must undergo consultation through the formal Committee process, as well as directly with affected employees This does not prevent any other matter from being brought to the Consultative Committee process. However, such a step is not a requirement before implementation of any such 'other' proposal.*
>
> *In bargaining for a new enterprise agreement the MFB will be seeking to have consultation occur as and when the need arises. The MFB considers that consultation is essential but that it can occur in a manner which is more efficient than the current Committee and Sub-Committee structure.'*

37.2 The MFB commits to consult in accordance with the Undertaking. In addition, consultation will take place in accordance with the MFB's occupational health and safety obligations. Finally, the MFB is not limited by the terms of the Undertaking in the consultation it undertakes. The evidence of O'Connell and Rau, detailed above in respect of the consultation submissions, demonstrates the commitment of the MFB to

consultation with employees and other stakeholders, even absent any requirement to do so under industrial instruments or otherwise.

38 Requirements to agree on new or refurbished stations and other premises and redeployment thereto.

38.1 Clauses 90.7 of the Operational Staff Agreement relevantly provides that

> *'No employee will be relocated or directed to relocate into temporary premises prior to there being agreement reached between the parties as to any necessary temporary facilities and amenities'*

38.2 Clause 90.8 similarly provides in respect of relocations to permanent premises.

38.3 Clause 90.9.3 provides that:

> *'Deployment of staff to a particular station shall not occur until infrastructure, furnishings, fittings and all deployment principles and matters have been agreed to in respect of that station'*

38.4 Similar provisions apply in respect of FSCCs (Operational Staff Agreement, cl 115).

38.5 It is not clear as a matter of law from the terms of these provisions, and particularly clause 90.9.3, with whom agreement must be reached in each circumstance. What is clear is that:

(a) a process exists whereby the sign-off of end users and others is required at each of the four project gateways (see Pearson MFB-37 at [21]);

(b) this process is the direct result of the requirements of the Operational Staff Agreement, in particular the above clauses and the requirement for consensus in decision making by the Consultative Committee and consensus in the recommendations of the RADAP subcommittee; and

(c) this process has seriously impeded the ability of the MFB to fulfil its strategic planning objectives, due to the requirements (and changing positions) of end users.

38.6 Acting ACFO Pearson, Acting Executive Manager Property Services, summarises the process required to secure 'agreement' for the purposes of the Operational Staff Agreement as follows:

> *'At each of the four project gateways, agreement is evidenced by signatures (on an agreed standardised form) from a number of individual end-users (signatories) as follows:*
>
> - *The representatives of each shift who are based at that fire station. There are four shifts at each fire station, generally represented by the Station Officers of each shift. An end-user from each fire station is nominated to facilitate the agreement of the four shifts. The sign off form*

will contain each of the shift representative signatures as well as the end-user signature.

- *A Health and Safety Representative.*
- *The Infrastructure Commander.*
- *A Branch committee member of the UFU.*

Once sign-off has been received from each of the signatories at a gateway, RADAP will review and, if it approves of the gateway, will recommend it back to the Consultative Committee for endorsement. The Consultative Committee will then review the recommendation and may either endorse or reject the gateway. The Consultative Committee will never endorse a gateway, or even consider it, if all signatories have not been received.'

38.7 As set out below, Senior Counsel for the UFU questioned Mr Pearson as to whether the above process and the associated difficulties could in fact be said to derive from the requirements of the Operational Staff Agreement. The answer was a resounding yes (transcript PN4856-transcript PN4866):

'That's the experience, and you say in paragraph 38 that it's not the people in the consultative committee or RADAP that inhibit the progress with projects, with property projects, both MFB and UFU representatives at RADAP work hard to progress projects and influence end users where there's resistance?---That's correct.

So that seems to me to suggest that the problem is not with the members of the RADAP or the consultative committee, but rather rounding up the support of the end users?---Correct.

Is that correct?---Yes.

Yes. That's why I asked you the previous question. You say in 39 that the problems and delays are due the process which is necessary to meet the requirements and satisfy the consultative committee that agreement has been reached with the end users. Now, there's nothing in the enterprise agreement that I've been able to find that requires the end users to be consulted, or their unanimous agreement to be obtained. Can you direct me to anything in the agreement that requires that?---What I've referred to in my statement quite clearly is for RADAP and CC to actually endorse a project. It won't be considered for endorsement unless it has the signatories of the end users and the relevant other signatories as in the health and safety reps and stuff. So therefore without end user agreement, we won't have agreement.

Where does the obligation or requirement to have the agreement of the end users come from?---The clause that we must have agreement at the consultative committee by definition means we've got to have agreement.

So are you saying that the agreement - sorry, start again. The clause says you've got to have agreement of the consultative committee. Correct?---We've got - yes.

Is that right or not, in your own terms?---Yes, that's correct.

Okay. So the consultative committee are a group of people nominated from the MFB and from among the employees. They're unlikely to be - although

they might be in some cases, but generally unlikely to be the end users of a particular station?---Sometimes they are.

Yes?---Sometimes they're not.

Where they're not end users, how do we get to the stage where you're required to consult end users?---Through - virtually all the property projects are referred to the subcommittee of RADAP.

RADAP, yes?---RADAP has clearly created a sign-off process that articulates agreement of the people that are actually the end users, and RADAP will only refer recommendations for endorsements to consultative committee if the actual signatories are actually in agreement of the end users for any project. So without the signatories on any project going through RADAP and being referred to CC, consultative committee, without those signatures of agreement we're unable to progress any project.'

38.8 Clauses 90.7, 90.8 and 90.9.3 of the Operational Staff Agreement give the UFU and employees at particular premises the power to:

(a) prevent the movement of fire stations to sites the MFB wants to place them;

(b) prevent upgrades unless end user demands are met (such as, in the case of the Eastern Hill upgrade, a requirement that there be a separate locker area, which was in 'complete conflict' with the Agreed Design Principles and inconsistent with privacy requirements, all so that firefighters' rest and recline towards the end of shift was undisturbed);[98]

(c) prevent temporary or permanent relocations or deployments to stations or other premises, including training facilities.

38.9 Again this is a most significant power in the hands of the UFU and particular employees. This power has resulted in the cessation of, and loss of funding for, a number of initiatives within the Property Framework, including:

(a) the proposed relocation of Northcote fire station to a location determined by the Strategic Location Plan in order to 'maximise the health and safety of the community as well as operational staff'[99] - see **Appendix D**;

(b) the proposed $3.5 million refurbishment of Eastern Hill - see **Appendix DD**;

(c) the proposed refurbishment of Ringwood fire station.

38.10 The proposed refurbishment of Ringwood fire station concerned a half-life refurbishment, which was proposed also to include an increase in station capacity. Ringwood fire station has two appliances, each of which require a minimum crew of four. The station only accommodates eight firefighters. This means there is no capacity to roster additional firefighters to cover for contingencies such as unplanned leave. This

[98] Pearson MFB-37 at [96], [98]-[99]
[99] PN5334

means that there is a lot of overtime available at Ringwood under the retain and recall provisions of the Operational Staff Agreement. There was strong opposition to the refurbishment and the associated process, including by the UFU, which raised two grievances along the way.[100] The message is clear:

> *'Where the end-users don't want something to happen, for any reason, they are able to block a project because the UFU will not endorse anything that the end-users do not support'.*[101]

38.11 The result:

> *'...over a period of approximately four years and despite the efforts of myself and RADAP members, we were unable to finalise three significant capital works projects for which total funding of in excess of $8.5 million dollars had been obtained and in the process spent approximately $450,000. In each case, the window of opportunity (from a funding perspective) has effectively passed due to the inability to reach agreement'.*[102]

38.12 The relocation of employees from Albert Street to Eastern Hill is, on the other hand, an example of an initiative that proceeded, albeit with significant delays and costs resulting from clause 90.8 of the Operational Staff Agreement. Here, end user demands delayed relocation, resulting in costs that amounted to a little less than a third of the cost of the total works. This situation exemplifies that even where MFB initiatives are allowed to proceed under the Operational Staff Agreement, the MFB:

> *'must keep responding to issues raised by the UFU, even when we know that they have no substance. Trying to address all the issues is a long process to try and arrive at a palatable end position for both sides. That is the only avenue open to us under the 2010 Agreement, given that we need the UFU's agreement on amenities in order to progress occupation'.*[103]

Undertaking

38.13 Clause 75.8(c) of the operational staff undertaking provides that:

> *'Deployment of staff to a particular station shall not occur until infrastructure, furnishings, fittings and all deployment principles and matters have been consulted on in respect of that station in accordance with the procedure set out in clause 10.2 (and 12).'*

38.14 Consultation in these circumstances will continue, regardless of whether the deployment is 'major change' with 'significant effects' in accordance with clause 10. That means that consultation will occur directly with employees and the UFU or other relevant representatives.

38.15 The effect of this change on the MFB is that it will be able to follow through on its strategic property objectives, including:

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[100] Pearson, MFB-37 at [107]-[124]
[101] Pearson, MFB-37 at [122]
[102] Pearson, MFB-37 at [123]
[103] Pearson supplementary statement MFB-38 at 30

(a) Station refurbishments and upgrades to modernise stations and ensure they meet the necessary standards including in relation to health and safety and privacy;

(b) Delivery of projects in a timely and cost effective way, rather than through ongoing negotiations with end user employees to ensure each need of a potentially changing user group is met; and

(c) Station and other premises relocations, including in accordance with the Strategic Location Plan to ensure the equitable distribution of stations and maintenance of response time targets.

38.16 Each of the above also has the potential to benefit the community. Station upgrades may for example allow for easier egress from fire stations to an incident. Relocation in accordance with the Strategic Location Plan has an obvious benefit to the community.

38.17 The effects of this change on employees are that:

(a) they will benefit from capital works initiatives including refurbishments, even if there is some resistance to aspects of these. It is submitted that this is a net benefit to employees. Currently, the wishes of a single or minority group of employees can deprive the remaining employees or future employees of the benefits of any given capital works project. This occurred in the proposed Eastern Hill refurbishment;

(b) there may be aspects of a project with which employees are not satisfied for reasons based on self interest. This could include an upgrade that created capacity for additional firefighters which deprived employees of the benefit of overtime entitlements associated with recall and retain. Or it may include a refurbishment that enhanced the privacy of firefighters at a particular station making it easier to accommodate women[104] (though at least for female employees, this may be a benefit of termination);

(c) consultation will continue to take place with respect to projects that create major change with significant effects on employees, and also in relation to station moves, pursuant to the undertaking.

38.18 As mentioned earlier in these submissions, this does not limit when consultation will occur in practice. In any event:

(a) there is no evidence before the Commission of any proposed projects currently underway or in the pipeline requiring consultation;

(b) the MFB must be presumed unlikely to initiate any projects without proper consultation.

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[104] See for example Pearce statement MFB-29 [106]-[111]

38.19 That the MFB recognises the benefits of consultation is clear from the evidence of Mr Pearson:

> *'I do not disagree that it is very important to have end-users input through consultation into such decisions about firestation design and facilities. My point is that the MFB must be able to make a decision about such matters when, as can happen under the current 2010 Agreement, an impasse arises.'*[105]

39 Lateral Recruitment

39.1 The restrictions on lateral recruitment are removed.

39.2 The evidence of the UFU in this regard is discussed above in some detail as is the MFB's position that the prohibitions on lateral recruitment infringe Re AEU principles. In addition to Mr Angwin's evidence of the UFU's desire to maintain a closed shop, Mr Taylor gave evidence in chief to the effect that:

(a) he was concerned about the experience and competence of lateral recruits to perform the role; but

(b) although he did not 'really have a good knowledge' of the training and entry requirements of comparable fire services, he 'would imagine that' firefighting duties were similar to that performed by MFB firefighters.[106]

39.3 From his concluding remarks on the matter in examination-in-chief it would appear that Mr Taylor was actually quite comfortable with the concept of lateral recruitment:

> *'If you had an experienced firefighter from the New South Wales Fire Service seeking lateral entry into the MFB at a level above recruit, do you have a concern that that firefighter would be unable to carry out the technical functions that are required in the MFB subject to being trained in the MFB's unique operating procedures?---Not particularly, no, as long as that firefighter had gone through a recruit course and had been trained appropriately.*
>
> *Do you assume that if the firefighters reached a rank of, let's say, senior station officer or something of that sort, that person would have been through a recruit course - - -?---I would assume that.*
>
> *- - - in their own firefighting service?---I would assume that.'*[107]

39.4 No employees gave evidence about the effect of this change on them.

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[105] See for example Pearson reply statement MFB-39 at [13]
[106] PN11915-11916
[107] PN11917-11919

39.5 The effect of the change on the MFB is set out in the statement of Chief Officer Rau[108] as follows:

(a) 'At the forefront is sector reform. Allowing cross fertilisation between, for example, the CFA and the MFB would allow the implantation of knowledge and experience from one organisation to the other.'[109]

(b) 'Additionally, it takes time to progress Recruit firefighters through the ranks. If, as an example, you could take a CFA station officer, provide the appropriate transition program and make their employment subject to a probationary period, you are getting somebody with the appropriate skill set and with the benefit of the knowledge of another organisation. In my view the same rationale could also apply to fire services across Australia and internationally.'[110]

(c) It would enable the MFB to engage in appropriate hiring and promotion of employees at different ranks, particularly given the MFB's ageing workforce. On the current arrangements the MFB would be required to offer acting up opportunities to significant numbers of its staff, which is not the appropriate course.111 Employing and promoting the right employees is also, for obvious reasons, in the best interests of the community.

40 Other effects of termination

40.1 Some of the UFU witnesses gave evidence of their opinions as they saw it about other effects of termination. These included:

(a) loss of trust and confidence of firefighters in the MFB;

(b) loss of commitment for seven on the fireground (Riley);

(c) loss of the training framework (Trimboli);

(d) concerns of ACFOs regarding a return to individual contracts (Quinton);

(e) commanders not having an underpinning award (Trimboli);

(f) loss of consultation about rostering (Mele);

(g) loss of OHS agreement (Taylor);

(h) loss of salary packaging;

(i) loss of EMR conditions (Russell);

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[108] MFB-7 at [91],[92],[98],[99]
[109] At [91]
[110] At [92]
[111] At [98]

(j) loss of transfer between stations protections.

40.2 As to each of the above:

(a) Loss of trust and confidence - Some of this evidence was given by ACFOs that had been through what they saw as bad experiences with the MFB since the mid 90s. Some used exaggerated and hyperbolic comment ('no candid communication', 'propaganda' at [19] of Chis Watt, see transcript PN10677-transcript PN10683). Others still do not trust the MFB although all involved management have left the MFB. Ultimately, as these employees acknowledged, over this period they performed their duties professionally and to the best of their ability.[112] Loss of trust and confidence is an effect that is very speculative. Some may have little trust and confidence at present for any number of reasons. This might include the persistent campaign of the UFU to engender distrust in the MFB, enabled by the power it wields under the 2010 Agreements. Others may not react at all in this way to termination or otherwise. In a parallel way, often this is used as an assertion by employers to oppose reinstatement in unfair dismissal proceedings. The Commission has been generally reluctant to attribute too much weight to this. In the present case, this effect is speculative and not likely in a disciplined service.

(b) Seven on the fireground – Chief Officer Rau said at MFB-8 at [22(C)] that in the event that the MFB is successful in its application to terminate the 2010 Agreements, in accordance with the undertakings there will be –

> *'No loss of, or change to, the current deployment model in that there will be seven firefighters on the fireground before the commencement of safe firefighting operations; except where the Chief Officer determines that safe firefighting operations can be conducted with a single appliance. An example of this might be responses to bin-fires, wash aways and pole fires.'*

(c) Should the MFB wish to modify the position of seven to the fireground, for example, in responding to bin fires, it would consult before making any such change. As Mr Rau stated in cross-examination at transcript PN455-463:

> *'But in your proposal the seven on the fireground will change?---Absolutely not.*
>
> *There'll be callouts where you won't have seven?---Not unless we consult.*
>
> *I thought you said in your statement that some responses wouldn't have the two appliances?---Yes, that's right. I have a firm view that responding two appliances, lights and sirens, to a rubbish bin fire in the central business district is unnecessary. But any change - and I think*

[112] Walker, PN 5316-7, Quinton, PN 10346

I've said in the statement that there are washaways, pole fires and bin fires - in my view, one truck is adequate for those responses. However, I've said also - and I'm saying now - that I'm happy to consult on that to understand the views of firefighters in relation to that matter.

When you say you're happy to consult about that, you're not talking about consulting on the model that's in the agreement at the moment, are you?---No.

No?---Because it's an operational matter.

Have you ever responded to a bin fire?---Yes, I have. Not with the Metropolitan Fire Brigade, but absolutely, working - - -

Not as a fireman?---Absolutely.

You mean when you were at the CFA?---Yes, and also in Canada.

I'm sorry, I didn't - in Canada?---Yes, also in Canada. Yes, I was there for 12 months.'

(d) Loss of the Training framework – The undertakings maintain the Training Framework (cl 77.1, Schedule 2);

(e) ACFO return to individual contracts – There is no intent to do that. Mr Walker had heard nothing to suggest this (transcript PN 5156);

(f) Commanders Award – The only Commander to raise this was and is covered by the Commanders Award (Trimboli, transcript PN 11783-11803, Commanders Award is at MFB-2);

(g) Consultation about rostering – The Rostering Committee will be retained, as will the role it currently plays under the Operational Staff Agreement (see for example operational staff undertaking cll 58.2(a)(i), 58.3(e), 68.2(b), 68.4, 68.6(b);

(h) OHS Agreement – That will continue to be applied (see operational staff undertaking cl 29.2 and Schedule 1);

(i) Loss of Salary packaging. There will be no such loss. – This is dealt with in clause 32 of the operational staff undertaking;

(j) Loss of EMR Conditions. There will be no such loss. – This is dealt with in clause 72 of the operational staff undertaking;

(k) Transfer between Stations – This is maintained under clause 94 of the operational staff undertaking.

41 Period of Undertaking

41.1 Concerns were raised by a number of UFU witnesses as to the 12 month duration of the Undertakings. For example, Mr Walker indicated that his concern was not with the content of the undertaking, but the duration (transcript PN5202-3). Mr Brown raised his

concerns including at transcript PN6087, while Mr Angwin, like almost all UFU witnesses examined on the matter, had not read any of the undertaking, but noted the particular concerns being raised by employees in relation to the 12 month term (transcript PN7833). One issue raised by Mr Walker was a concern over the period of the undertaking being for one year from the date of termination: see PN5202. The MFB propose that be extended to 18 months. As to this period, a number of matters may be said.

41.2 During the period of the Undertakings, presumably the parties will continue to bargain to reach agreements. It may be noted that the MFB sought to commence bargaining in March 2013. Assuming a decision in favour of termination in September or October 2014, then the Undertakings will continue until around March or April 2016. If an agreement cannot be reached in a 3 year period, then it is doubtful there will ever be an agreement.

41.3 Further, in that period, the UFU will have access to its right to take industrial action. It is simply not right to submit, as the UFU does at [74] of its primary submissions that the MFB 'will be free of any countervailing bargaining power of the employees'.

41.4 As Mr Hamilton, the President of the UFU, made clear:

(a) there has been resort to industrial action by firefighters before (transcript PN7672);

(b) the UFU has been involved in organising such action recently against the MFB (transcript PN7669-7670);

(c) industrial action can result in collateral damage. This might be in the millions of dollars to the MFB, or to the community whose safety may be compromised (transcript PN7672 to transcript PN7687; exhibit MFB-48);

(d) the UFU has no problem with such damage being caused. (transcript PN7687 to 7690)

41.5 The above evidence is important. That right to take industrial action and the readiness and willingness to do so comes into the consideration of the appropriateness of the termination and effects on all parties.

41.6 The MFB has a number of matters it wants to progress in bargaining. As Mr Rau said at [7] – [8] (MFB-8):

> *'The undertakings contain a large number of provisions which the MFB will provide following the termination of the Agreements, but which it would not wish to include in any replacement agreements that it negotiates with MFB employees and the UFU. These include, for example:*
>
> - *The MFB has maintained two separate undertakings: one for the rank of Assistant Chief Officers and the other covering the operational ranks of Recruit Firefighter to Commander. The MFB will continue to seek*

agreements with differing scope to those of the current Agreements (and the undertakings). As reiterated from the commencement of bargaining, the MFB believes that the ranks of both Assistant Chief Officers and Commanders should be covered by a separate enterprise agreement with terms and conditions specific to the nature of their employment;

- *A dispute resolution procedure that deals with all employment matters that may arise, including disputes between the MFB and the UFU. However, in bargaining we would only agree to a dispute resolution procedure that deals with disputes arising from the agreement and the National Employment Standards;*
- *Occupational Health and Safety matters, including Schedule 1. We say that OH&S legislation appropriately deals with OH&S matters and does not need to be in an enterprise agreement;*
- *The MFB has not included fit for work provisions in the undertakings, which it will be seeking to include in new agreements;*
- *Outcomes of disciplinary actions, such as adverse reports. While we maintain these provisions in the undertakings, we say outcomes for disciplinary matters best sit under the Metropolitan Fire Brigades Act 1958 (Vic) (**MFB Act**);*
- *Continued payment of penalties to employees when deploying them within the Metropolitan District (**MD**). We say that the organisation is penalised when we want to move employees around the MD by the requirement to pay employees for such moves. The MFB's position is that the organisation should not be financially penalised for deploying operational employees within the MD and we will be seeking to address this in bargaining;*
- *The undertaking recognises the FWC decision on instructor streaming, although it is the MFB's view that this matter could be appropriately addressed by a higher duties allowance. The MFB is seeking to achieve this in bargaining;*
- *The undertaking maintains a regular Consultation Committee and Sub-Committee structure, however the MFB's position in bargaining is that we will consult with employees and employee representatives as and when the need arises, without a committee structure; and*
- *The undertaking contemplates maintaining the current rostering practices. It is the MFB's position that any matters around the rostering of employees to the 10/14 roster are matters for the MFB in determining the appropriate allocation of its resources in discharging its statutory responsibilities.*

I do not consider that the provisions maintained by the undertakings referred to above are all in the best interests of the MFB and I believe that we can deliver a better and more efficient service to the community. The MFB will be seeking to bargain for a different outcome in further negotiations following any termination of the Agreements'.

41.7 These are matters that are being maintained by the undertaking that the MFB wants to remove from its industrial arrangements. Whilst the effect of termination will be to lessen the effect of the consultation veto and the status quo provisions of the dispute procedure, in respect of the restrictions on lateral entry, minimum staffing requirements

and restrictions on contractors, there are good arguments to the effect such provisions are unenforceable now.

41.8 In all the circumstances, the impact on the bargaining position of either party will not be such as to make termination not appropriate.

42 Effect on bargaining position

42.1 It is the UFU's position that 'Termination will reduce the bargaining pressure on the MFB, and thereby deliver it a substantial advantage that it doesn't have now' (Casey Lee (UFU-23) at [62]).

42.2 The key advantage delivered by the termination would be restoring the capacity of the MFB to implement operational initiatives in the workplace.

42.3 It will do this by removing the UFU consultation veto, but retaining consultation obligations for the input and protection of employees. It will do this by removing unduly restrictive provisions that deny the MFB the right to allocate staff according to risk and demand, but which retain current rostering practices, including the practice of rostering 300 operational staff per shift. It will do this by removing the status quo provision of the dispute resolution procedure which has served as a bar to the implementation of any initiative that the UFU has not agreed, but retaining ambit over the broadest possible range of disputes.

42.4 In *Tahmoor*, it was said that 'it is generally inappropriate for the Commission to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining power between the parties and thereby deliver to one side effectively all that it seeks from bargaining'. In *ERA*, it was said at [29]:

> *'In my view it is unreasonable to lock such an agreement in place indefinitely. The legislative scheme supports the ending of agreement obligations at or after the nominal period of the agreement. Termination of the agreement does not preclude further enterprise bargaining. Regular revisions and renewal of enterprise arrangements is desirable.'*

42.5 As to the above:

(a) almost inevitably termination will have an effect on bargaining. The legislative scheme must contemplate that for the reasons set out in *ERA* above. Indeed a positive or negative effect on bargaining is an appropriate consideration in a termination application;

(b) there will consequently almost inevitably be an alteration to the status quo in respect of the balance of bargaining power. Generally, the agreement subject to the application will contain something the union and employees want to keep and the employer wants to remove;

(c) accordingly the interference in the bargaining process would have to be significant and to be weighed against the legislative scheme considerations of the ending of agreement obligations and a productive and balanced workplace;

(d) the facts in *Tahmoor* were that termination would be 'a very substantial improvement in *Tahmoor's* bargaining position and an equivalent weakening in the bargaining position of the employees' and 'Tahmoor will effectively achieve all that is sought out of bargaining....'(at [59]);

(e) the facts in the present matter are different. That the MFB would achieve some of the significant matters it wants in bargaining, cannot operate to be such a factor that removes access to termination for the reasons outlined above in *ERA*.

42.6 Termination of the 2010 Agreements will impact on the bargaining between the MFB and the UFU. However:

(a) the Undertakings maintain many terms and conditions that the MFB is not content to include in its further agreements and as such there is a real incentive to bargain;

(b) any refusal by the Commission to terminate the 2010 Agreements maintains a situation which is not only unworkable and against the best interests of the MFB, the community and, in many cases, employees themselves, but which would also preserve the position of the UFU, itself providing a disincentive to the UFU to bargain and reach agreement with the MFB;

(c) there is a statutory scheme that enables the UFU to take industrial action to increase bargaining pressure on the MFB, and which the UFU President has accepted to be a real option for the UFU, regardless of any 'collateral damage', including the health and safety of the community.[113]

43 The circumstances of the UFU and the likely effect of the termination on it

As to the UFU, termination of the 2010 Agreements will have the likely effect on the UFU of:

(a) leaving it with all the rights it now has under the FW Act;

(b) leaving it representing firefighters who want to be so represented;

(c) limiting veto rights that it has and exercises in respect of the operations of the MFB;

[113] Exhibit MFB-48

(d) removing its ability to not agree matters with the MFB.

44 Effect on the other persons and appropriateness

44.1 Noted throughout these Submissions are the positive effects that termination will have on other persons, in particular:

(a) the CFA and other emergency services in Victoria supported by the MFB (such as Ambulance Victoria, through EMR) or with whom the MFB collaborates through multi-agency exercises, displays or, of course, in emergency response;

(b) all or part of the community of Victoria.

44.2 These effects, all ultimately for the benefit and health and safety of the community, should carry substantial weight in considering the appropriateness of the termination.

45 Other matters

45.1 As follows:

(a) Section 226 says that apart from the above circumstances, other circumstances can be taken into account.

(b) Other considerations would appear to be:

(i) the content that infringes Re AEU;

(ii) content that does not pertain to the employment relationship;

(iii) the Deed.

46 Pertaining to the employment relationship

It is a requirement that matters in enterprise agreements pertain to the requisite relationships. Some provisions of the Operational Staff Agreement, including the prohibition on contracting out, do not. These terms are considered with Re AEU issues in **Appendix B**.

As already mentioned, it is undesirable for an enterprise agreement to contain terms which are unenforceable. This at the very least creates uncertainty as to the rights and obligations of the parties. The situation is particularly significant in the case of the Operational Staff Agreement, given the pervasiveness of unenforceable terms, many of which are critical in nature.

47 Deed

47.1 The Deed[114] referred to in the submissions of the UFU has limited relevance:

(a) it cannot affect or remove the rights a party has to seek termination of an enterprise agreement;

(b) employees are not party to the Deed;

(c) it expressly contemplates termination;

(d) the UFU has taken no action to enforce the Deed as a bar to the MFB exercising its statutory rights in this proceeding, and nor could they given the terms of clause 17.1 of the Deed and the unenforceability of the Deed;

(e) legally, it is the position of the MFB that it is unenforceable in any event.

47.2 The enterprise agreement is an agreement made under Pt 2-4 of the FW Act. It is a specific instrument made under the detailed regime for which Pt 2-4 provides and is enforceable only as provided by the FW Act. The FW Act has made provision for termination of enterprise agreements after their nominal expiry date in Subdivision D of Pt 2-4 of the FW Act. The right to seek termination of an agreement is a statutory right. The Deed, nor even the terms of an enterprise agreement, can remove that statutory right: see *Toyota Motor Corporation Australia Limited v Mamara* [2014] FCAFC 84 at [96] – [97]; [105].

47.3 Employees are not party to the Deed. As a general rule, the doctrine of privity means that employees not party to the Deed cannot enforce its terms. The Deed in its terms seeks to deal with the privity issue by providing that the UFU enters into the Deed both as principal in its own right (clause 3.1.1) as well as agent for all existing and future employees of the MFB (clause 3.1.2). Clause 3.2 also provides that the terms of the Deed apply to all employees. However, it is doubtful whether clause 3.1.2 would be enforceable. The clause refers to employees 'from time to time.' On its terms the UFU purports to act as agent for future, unascertainable employees of the MFB. There is High Court authority that for an agent to enter into a contract on behalf of a principal, the principal must be ascertainable at the time of entering into the contract.[115] Clause 3.1.2 also refers to 'each employee of the MFESB.' In order for an agency relationship to be established, each employee must have authorised the UFU to enter into the Deed on his or her behalf.[116] There is no evidence that such authorisation existed – nor could it have existed in any event for persons employed since the signing of the Deed.

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[114] Annexure "Lee-2" of the statement of Casey Lee (**UFU-23**) at page 73
[115] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107
[116] See *Ryan v Textile Clothing and Footwear Union of Australia* (1996) 2 VR 235

Further, the UFU purports to enter into the Deed on behalf of all employees (that is, extending to employees who are not members of the UFU). There is no basis upon which the UFU may enter into an agreement on behalf of non-members. In the circumstances, clause 3.2 is most likely unenforceable. It therefore ought not be considered that the UFU is a party to the Deed 'on behalf of and for the benefit of each employee' of the MFB 'from time to time during the currency of the Deed'. Consequently, as the employees are not party to the Deed, its terms cannot apply to employees. In accordance with clause 20 of the Deed, clause 3.2 and arguably clause 3.1.2 could be severed. However, what would remain is a Deed, the parties to which are the MFB and the UFU as principal in its own right. That said, the UFU has not taken any action against the MFB alleging a breach of the Deed; and nor could they given the terms of clause 17.1.

47.4 Clause 17 of the Deed expressly contemplates termination. Relevantly, clause 17.1 provides as follows:

> *'This Deed will remain in force until:*
> *(a) it is replaced by another Deed made between the parties;*
> *(b) the parties agree in writing to terminate the Deed; or*
> *(c) the 2010 Enterprise Agreement is terminated in accordance with the Act'.*

47.5 Legally, the MFB's position is that the Deed is unenforceable in any event. Further to the privity issues referred to above, three other issues strike at the enforceability of the Deed. These are set out below.

Tainted with illegality doctrine

47.6 The Deed imposes a number of significant obligations on the MFB. Most notably clause 11, which provides that if a term of the Operational Staff Agreement is void, unlawful or otherwise unenforceable, then to the extent that the term is void, unlawful or otherwise unenforceable, that term shall be incorporated into and form a term of the Deed.

47.7 There is authority to support the proposition that in some circumstances, contracts may be unenforceable because they are 'tainted with illegality'.[117]

47.8 In the *Yango case*,[118] the High Court held that there are four main ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful:

(a) the contract may be to do something which the statute forbids;

(b) the contract may be one which the statute expressly or impliedly prohibits;

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[117] *McLennan v Surveillance Australia Pty Ltd* ('McLennan case') (2005) 142 FCR 105
[118] *Yango Pastoral Company Pty Ltd v First Chicago (Aust) Ltd* ('Yango case') (1978) 139 CLR 410

(c) the contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or

(d) the contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits.

47.9 These principles have been more recently applied by the Full Court of the Federal Court in an industrial context. In the *McLennan case,* there was an AWA and a later enforceable side agreement requiring the employee to reimburse the employer for the amount spent on providing new training to the employee, should she resign with a specified time after completing the training.[119] The Full Court held that the WR Act prohibited the alteration of rights and obligations concerning a matter dealt with by an AWA, if it might disadvantage the employee, by means other than those provided in the WR Act (such as those which stipulate the requirements for a variation to an existing AWA). It consequently found that the side agreement entered into was unenforceable. Further, in the Yango case, the High Court also held that 'if a statute imposes a positive obligation to make contracts in a certain way, a prohibition against making contracts in another way can be implied as a matter of construction ...'[120]

47.10 In light of all of the above, insofar as the Deed is concerned, the MFB's position is that the effect of clause 11 is to incorporate terms into a side deed which would, save for their unenforceability, be contained within the Operational Staff Agreement approved in accordance with the FW Act and this seeks to circumvent specific provisions in the FW Act that govern the making of enterprise agreements. Consequently the Deed entered into is unenforceable.

Void for uncertainty or incompleteness

47.11 A deed will be void for uncertainty where the language used is such that a court is unable to attribute a sufficiently clear and precise meaning in order to identify the scope of the rights and obligations agreed to.

47.12 The MFB's position is that Clause 11 is uncertain. The clause provides that any terms of the Operational Staff Agreement that are 'void, unlawful or otherwise unenforceable' shall be incorporated into the Deed. It is uncertain, however, when a term of the Agreement will be void, unlawful or otherwise unenforceable and therefore unclear what terms are covered by the Deed. The clause is not able to be applied with reasonable certainty because it cannot objectively be determined when something will be incorporated into the Deed. An agreement will be void for incompleteness where an

[119] (2005) 142 FCR 105
[120] Yango, citing *Victorian Daylesford Syndicate Ltd v Dott* [1905] 2 Ch 624

essential part of the agreement is incomplete.[121] A contract will fail where a material part of the bargain has not been agreed. A contract must include all of its essential terms from the time it is executed in order to be complete. If there is a clause that allows a material obligation to be prospectively imported into the contract (such as clause 11), that clause is of itself void.

Void on public policy grounds

47.13 An agreement will not be enforceable if it illegal, void or unenforceable as a matter of public policy. The relevant definition of public policy is 'some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life.'[122]

47.14 The MFB's position is that clauses 6.1 and 6.2 are void on public policy grounds. Clause 6.2.3 prohibits, for example, the MFB taking any action in relation to unprotected industrial action. This could be characterised as contrary to public policy because the governing principle in law is that employers may seek remedies against unlawful industrial action.

47.15 Consequently, the Deed is legally unenforceable.

Terminating both of the 2010 Agreements

47.16 The evidence before the Commission particularly focuses on the Operational Staff Agreement. There are only a small number of ACFOs, who are among the senior ranks of the MFB, and the ACFO Agreement by its nature and scope is not, and could not be, as problematic as the Operational Staff Agreement. Nevertheless, the ACFO Agreement contains the same consultation and dispute resolution processes as the Operational Staff Agreement, which are of critical importance to the current application for termination. Further, under the Terms of Reference, the consultative committee for ACFOs and Operational Staff is one and the same.

47.17 Although the tendency has been for the UFU to raise grievances under the Operational Staff Agreement only, a number of disputes could equally or jointly have been raised under the ACFO Agreement (examples include the human resource initiatives on which Michael Werle gave evidence and the technology initiatives including personal internet use limitations and the rollout of Windows 7).

47.18 No doubt if it were only the ACFO Agreement that was in force, more disputes would be raised under that agreement.

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[121] Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600
[122] A v Hayden (1984) 146 CLR 532 at 571

47.19 Moreover there is an indication in the evidence that the UFU might raise disputes under the ACFO Agreement, with an extension of their impact beyond ACFOs, to operational staff. As Craig Lloyd notes in relation to the AirWatch grievance[123]

> *'However, as a result of the UFU grievance, which corporate employees appeared to have become aware of, some corporate employees also started refusing to accept the installation. This is a problem, and one which we have encountered on other occasions, where MFB corporate staff, whose enterprise agreement does not require consultation on all changes 'pertaining to the employment relationship', will in effect join in with a grievance raised under the 2010 Agreement as if it also applies to them. This is in my experience often due to the UFU instructing those staff to do so, or because the UFU sends bulletins in relation to a grievance not just to affected operational employees but to all employees. True copies of emails indicating this on this occasion are now produced and shown to me and marked CL-37.'*

47.20 In all the circumstances it is appropriate to terminate the 2010 Agreements.

Corrs Chambers Westgarth

Lawyers

FRANK PARRY QC

PATRICK WHEELAHAN

8 August 2014

[123] Craig Lloyd MFB -17 at [154]

Appendix A

MFB Witness Name	Position	Statements	Exhibit Numbers for Statements	Transcript Paragraph Numbers containing Oral Testimony
Peter Douglas Rau	Chief Officer	Initial witness statement	MFB-7	Transcript PN193 – Transcript PN709
		Reply statement	MFB-8	
Andrew Zammit	Acting Deputy Chief Officer	Initial witness statement	MFB-10	Transcript PN715 – Transcript PN809, Transcript PN822 – Transcript PN957
		Reply statement	MFB-11	
Margaret Mary Wilson	Manager of Business Assurance	Initial witness statement	MFB-12	Transcript PN958 – Transcript PN1148
		Reply statement	MFB-13	
David Ali Youssef	Regional Director, North West Metro Region	Initial witness statement	MFB-14	Transcript PN1149 – Transcript PN1135, Transcript PN1138 – Transcript PN1763
		Reply statement	MFB-15	
Craig Lloyd	Executive Director of Property and Assets	Initial witness statement	MFB-17	Transcript PN1769 – Transcript PN2173
Paul Stacchino	Deputy Chief Officer	Initial witness statement	MFB-18	Transcript PN2179 – Transcript PN2540
		Reply statement	MFB-19	
Adam Edward Dalrymple	Acting Executive Director of Emergency Management	Initial witness statement	MFB-20	Transcript PN2552 – Transcript PN2806
		Reply statement	MFB-21	
David Allan Bruce	Acting Deputy Chief Officer	Initial witness statement	MFB-22	Transcript PN2808 – Transcript PN3009
		Reply statement	MFB-23	
Andrew O'Connell	Commander	Initial witness statement	MFB-25	Transcript PN3016 – Transcript PN3331
		Reply statement	MFB-26	
Darren Peter McQuade	Commander	Initial witness statement	MFB-27	Transcript PN3336 – Transcript PN3617
		Reply statement	MFB-28	
Janette Lori Pearce	Senior Consultant, Workplace Relations	Initial witness statement	MFB-29	Transcript PN3618 – Transcript PN3750
		Reply statement	MFB-30	

MFB Witness Name	Position	Statements	Exhibit Numbers for Statements	Transcript Paragraph Numbers containing Oral Testimony
Darren John Davies	Director of Regional Operations in North West Metro Region	Initial witness statement	MFB-31	Transcript PN3756 – Transcript PN3871
		Reply statement	MFB-32	
John David Jugum	Commander	Initial witness statement	MFB-33	Transcript PN3881 – Transcript PN3914, Transcript PN4117 – Transcript PN4412
		Reply statement	MFB-34	
Michael Anthony Werle	Director Human Resources	Initial witness statement	MFB-35	Transcript PN4418 – Transcript PN4568, Transcript PN 4576 – Transcript PN4788
		Reply statement	MFB-36	
Gregory John Pearson	Acting Assistant Chief Fire Officer and Acting Executive Manager Property Services	Initial witness statement	MFB-37	Transcript PN4792 – Transcript PN5032
		Supplementary witness statement	MFB-38	
		Reply statement	MFB-39	

Appendix B

Impermissible Content

1 In Re AEU, the Court expressed the implied limitation which exists on Commonwealth legislative power (derived from Melbourne Corporation) as follows:

> *'The limitation consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ('the limitation against discrimination') and (2)* ***the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments.****' [at 231]* (emphasis added)

2 In Re AEU the High Court further explained the second limb of the implied limitation as follows:

> *'At this point it is convenient to consider South Australia's argument based on impairment of a State's 'integrity' or 'autonomy'. Although these concepts as applied to a State are by no means precise, they direct attention to aspects of a State's functions which are critical to its capacity to function as a government.* ***It seems to us that critical to that capacity of a State is the government's right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds. An impairment of a State's rights in these respects would, in our view, constitute an infringement of the implied limitation.*** *On this view, the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question.* ***There may be a question, in some areas of employment, whether an award regulating promotion and transfer would amount to an infringement.*** *That is a question which need not be considered. As with other provisions in a comprehensive award, the answer would turn on matters of degree, including the character and responsibilities of the employee.' [at 232-233] (emphasis added)*

3 Applying the principle as stated above to the various awards and findings of disputes that were at issue, the High Court held that:

> *'[T]he operation of the implied limitation would preclude the Commission from making an award binding the States in relation to* ***qualifications and eligibility for employment, term of appointment and termination of employment, at least on the ground of redundancy.****' [at 234] (emphasis added)*

Section 172 of the FW Act

4 Section 172 of the FW Act sets out the matters in relation to which an enterprise agreement may be made, which relevantly include matters pertaining to:

(a) the relationship between an employer that will be covered by the agreement and that employer's employees who will be covered by the agreement (s 172(1)(a)); and

(b) matters pertaining to the relationship between the employer...and the employee organisation...that will be covered by the agreement (s 172(1)(a)).

Impugned clauses and the associated rationale

5 Applying the above to the Operational Staff Agreement, it is the MFB's position that the following clauses are void and of no effect, for the reasons set out the tables below.

Table 1 – Operational Staff Agreement

Clause	Rationale
27.1.3	**Clause 27.1.3** of the Operational Staff Agreement provides that the MFB may not terminate an employee's employment unless any dispute notified by the employee or the union has been resolved. The provision applies to any termination of employment, including on redundancy grounds (though other provisions in the agreement independently prohibit termination on redundancy grounds). By placing a significant hurdle on the right of the MFB to retrench employees, and potentially a complete barrier to such termination, clause 27.1.3 impairs the right of the MFB to determine the number and identity of the persons whom it wishes to dismiss on redundancy grounds. It is submitted that even if the clause fell short of acting as a complete barrier to termination (which it does not), it would still infringe Re AEU principles. As stated by the Full Bench in *State of Victoria v Health Services Union of Australia* Print P5473: '*The emphatic statement made by three members of the Court in M55/1996 has influenced us to state the test for application of the implied limitation in the broader form of whether there is a relevant impairment of the State's right. It would seem that an impairment of the relevant State's right is not coextensive with a prevention of the exercise of the right.*' It is further submitted that by impairing the right of the MFB to terminate employment in all circumstances (whether or not on redundancy grounds) clause 27.1.3 impairs the right of the MFB to determine the identity of its employees (by impairing the right of the MFB to determine who should remain in employment and who should be dismissed) and the number of its employees (for example, where the MFB does not propose to replace the individual in question).
32	**Clause 32.1 to 32.3** requires work performed, or capable of being performed, by employees in the classifications set out in the Operational Staff Agreement, to be performed by such employees 'who are directly employed by the MFESB'. These provisions impair the capacity of the MFB to determine the number of its employees. The MFB has no capacity to supplement its operational workforce with contractors and, therefore, must employ sufficient employees to ensure all contingencies are met. In addition, these provisions impair the capacity of the MFB to determine the number and identity of employees it wishes to dismiss on redundancy grounds (if for example, the MFB

Clause	Rationale
	wished to contract out particular roles or duties and retrench one or more of those employees currently performing those roles or duties). Further clause 32.1-32.3 impairs the right of the MFB to determine the 'term of appointment' of its workforce, in this case, who will be appointed as employees and who as contractors. As noted by the Full Bench in *Parks Victoria v The Australian Workers' Union and others* [2013] FWCFB 950 (**Parks Victoria**), 'term of appointment' refers to the initial decision to employ and the terms which pertain to that issue, as contrasted with 'terms and conditions of employment', which operate once the person is appointed (at [329]). Although the decision in Parks Victoria was based on the Referral Act, rather than the implied limitation, the Full Bench noted that the subject matter proscribed in Re AEU and the excluded subject matter in the Referral Act, as relevant to the decision, were either non-existent or immaterial (at [363]-[364]). **Clause 32.4** stipulates that if there is any consideration of 'delegating or assigning' any activities carried on, or capable of being carried on, by the MFB to 'another party', then the MFB must consult with the United Firefighters' Union of Australia (**UFU**) 'to reach agreement on the arrangements for and the manner in which the activity shall by [sic] carried out prior to implementation of any proposed change'. Although clause 32.4 does not contain the blanket prohibition set out in clause 32.1-32.3, the requirement to consult (see, for example, *Victoria v The Commonwealth* (1996) 138 ALR 129 in relation to redundancy consultation) and, even moreso, to reach agreement with the UFU prior to contracting out infringes Re AEU principles, for the same reasons as set out above. Clause 32.1-3 is of the same effect as clause 26.1 and 26.2 of the CFA Agreement (with clause 32.1 being in identical terms to clause 26.1). In the CFA Case, the UFU conceded that clause 26 of the CFA Agreement was a clause of the type referred to in Re AEU. Murphy J found that clause 26 of the CFA Agreement was invalid by reason of Re AEU. A further reason for the invalidity of clause 32 is that its provisions do not 'pertain' to the relationship between the MFB and its employees (or the UFU) as required by section 172(1) of the FW Act (*R* v *Commonwealth Industrial Court*; *Ex parte Cocks* (1968) 121 CLR 313).
33.1	**Clause 33.1** provides that 'for reasons including employee health, safety and welfare', staffing levels must be maintained at the level set out in Schedule 2. Schedule 2 in highly prescriptive terms details minimum numbers of employees and distribution of ranks ('staffing ratios'), including within particular zones and at particular stations. By requiring the MFB to ensure that it employs sufficient numbers to meet minimum manning requirements, these provisions constrain the capacity of the MFB to determine how many (a) operational employees it employs in total (number of employees); and (b) employees in each rank it employs (identity of employees). That the minimum staffing requirements impair the MFB's right to determine the number of its employees is indicated by clause 36.2 which sets out a 'staffing factor' of 5.62 (being the factor by which minimum staff numbers are to be multiplied to determine how many operational staff are required to be employed by the MFB, taking account of the 4-shift structure within the MFB's operations and leave cycles. Further, these provisions impair the right of the MFB to determine the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds should, for example, the MFB wish to implement a different 'staffing

Clause	Rationale
	ratio'. Clauses 36, 82.1.4, 82.1.5 and 92.10 of the Operational Staff Agreement compound the impairment of the rights of the MFB in these regards. The effect of clause 33.1 is substantially the same in all relevant respects as clause 27 of the CFA Agreement. In the CFA decision, the UFU conceded that clause 27 of the CFA Agreement was a clause of the type referred to in Re AEU. Murphy J found that clause 27 of the CFA Agreement was invalid by reason of Re AEU.
33.2	**Clause 33.2** of the Operational Staff Agreement provides that the MFB cannot make any employee redundant on either a targeted or voluntary basis 'unless otherwise agreed between the parties'. This provision impairs the capacity of the MFB to determine the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds.
36.1.1-36.3	Clause 36 details minimum crewing requirements or provisions inextricably linked to minimum crewing, including by reference to Schedule 2 and the comments in relation to clause 33.1 similarly apply to clause 36.1.1-36.3 on the basis that these provisions directly infringe Re AEU principles, or are inseparable from a scheme which does so.
36.7	Clause 36.7 provides that the MFB will ensure seven professional career firefighters to fireground incidents before commencement of safe firefighting operations. This clause impairs the right of the MFB to determine the number of its employees and the number of employees whose employment it wishes to terminate on redundancy grounds. It does this by requiring that the MFB employ sufficient employees to meet this requirement.
36.9	Clause 36.9 prohibits the cross-crewing of any appliance unless otherwise agreed with the UFU. Employees on a particular shift must be allocated to particular appliances by the Officer in Charge at a particular station. The employee cannot be used to crew any other appliance at that station on that shift, and rosters need to be formulated accordingly. This has the effect of requiring the MFB to roster greater numbers of operational staff to stations per shift than it would otherwise require, which in turn impairs the right of the MFB to determine the total number of its employees.
37	Clause 37.1 provides that, 'for reasons including the welfare and safety of employees', the MFB cannot employ any employee on any basis other than on a roster as set out in clauses 76 and 77 of the Agreement. This means that it is not open to the MFB to engage employees on a part-time or casual basis. This is confirmed by clause 37.2, which provides that 'for the avoidance of doubt' the MFB will not employ an employee on a part-time or casual basis, and that no employee shall hold a position on such a basis, other than with the agreement of the UFU. This limits the number of employees whom the MFB can employ (for example, the MFB may otherwise employ a larger number of employees, each of whom works fewer hours). It also interferes with the capacity of the MFB to determine the identity (as some individuals only have the capacity or availability to work fewer hours and are thereby precluded from being employed by the MFB) and term of appointment of its employees.
42.7.1-42.7.3 42.7.6	These clauses stipulate that employees are to be paid specified allowances in the event of particular transfers. These provisions, read together with the other limitations on transfer (see for example clause 82), create a situation in which operational Commanders try not to move people unless absolutely necessary. This means firefighters, at times, do not get to obtain a broader experience and understanding of the MFB's operations and equipment

Clause	Rationale
	(see John Jugum, MFB-33 at [15]) (see further comments in respect of clause 82) which in turn has the consequence of a reduction in knowledge, skills and experience of firefighters. Given the nature of the MFB's operations and the work performed by firefighters, it is the MFB's position that these provisions impermissibly curtail the right of the MFB to transfer its employees as it sees fit.
69.1.1-69.1.11	Clause 69.2 of the Operational Staff Agreement provides that all employees to whom Part B of that Agreement applies must be engaged in one of the classifications listed in the subclause. Those classifications are in turn defined in clause 69.1. All of these definitions are based on the premise that an employee can be appointed at a particular classification only if they have (a) completed the relevant training modules provided by the MFB; and (b) the requisite periods of service (all of which is required to be service with the MFB). This has the effect that the MFB cannot engage firefighters who have trained and/or served with any fire service other than the MFB: in other words, it prevents lateral hiring, for example from the Country Fire Authority or from a fire service in another State. The evidence of the UFU witnesses cross-examined on this issue was that these requirements effectively create a 'closed shop' (Angwin at Transcript PN7922, Taylor, Transcript PN11999-12000). These aspects of clause 69.1.1-69.1.11 impair the right of the MFB: (a) to determine the term of appointment and eligibility for employment (that, for example, is competency based) and (b) to determine the identity of its employees (as the requirement that firefighters from other firefighting services commence employment with the MFB as Recruit Firefighters, regardless of their experience and qualifications, is a disincentive to becoming employed by the MFB). A provision that purports conditionally to prevent an outside appointment to a vacant position affects the capacity of a government to determine the identity of a person it wishes to employ, and is invalid because it offends the implied limitation: *Australian Education Union, ex parte Victoria* (1996) 73 IR 250 at 262-3. Such a provision is analogous with the above, although the prohibition in the case of the Operational Agreement is absolute rather than conditional. Clause 69 is substantially the same in all relevant respects to clause 28 of the CFA Agreement. In the CFA decision, the UFU conceded that clause 28 of the CFA Agreement was a clause of the type referred to in Re AEU. Murphy J found that clause 28 of the CFA Agreement was invalid by reason of Re AEU.
70.1	Clause 70.1 makes provision for a process regarding employee secondments to be agreed between the parties. This provision regulates the transfer of employees and, in light of the nature of the services provided by the MFB, and the responsibilities of employees, it is the MFB's position that this clause impermissibly regulates transfer in contravention of Re AEU principles.
70.3 and 70.4, 70.8.6	Clause 70.3 relevantly provides for immediate progression from Qualified Firefighter to Leading Firefighter 'on the achievement of the appropriate qualifications'. This is akin to clause 70.4 which provides that all employees other than Commanders who complete a promotional course shall be promoted to the relevant rank immediately upon graduation. Commanders will be appointed as vacancies occur (cl 70.8.6.1.3). These provisions must be read together with clause 70.8.6 of the Operational Staff Agreement, as part of a scheme which requires the MFB to conduct a promotional course

Clause	Rationale
	when the number of employees in a particular classification reaches a specified threshold. As noted above, the completion of such promotional courses automatically results (except in the case of Commanders) in promotion to the next rank. These provisions mean that the MFB does not have the capacity to regulate how many employees are promoted in the ranks up to (but excluding) Commander, in line with business needs and/or merit. Not only must the MFB provide promotion training in circumstances which are outside its control, but it is then obliged automatically to promote all employees who successfully complete that training. This impairs the right of the MFB to determine the number of its employees (because a particular distribution of ranks is required to provide services effectively) and to promote employees as the MFB sees fit (under the promotion and transfer limb of Re AEU). Assuming the invalidity of the prohibition on lateral recruitment, these provisions would also impair the right of the MFB to determine the identity of its employees – that is, the automatic progression principles would impair the right of the MFB to appoint employees laterally to these positions which are instead filled internally by automatic progression. In Parks Victoria a provision requiring appointments to be on merit was held to infringe the implied limitation, as it prevented the employer offering the position to someone other than the most meritorious candidate and accordingly impaired the right of the employer to determine the identity of the persons it wishes to employ (at [344]-[345]). Similarly a requirement to fill promotional opportunities by automatic progression, impairs the right of the employer to determine the identity of the person it wishes to employ (or promote, under the promotion and transfer limb of Re AEU). Also in Parks Victoria, a provision that required certain vacant or newly created positions to first be offered to existing employees was found to infringe the implied limitation. The Full Bench held that the effect of the provision was to prevent the employer offering the position to anyone else where a suitable internal candidate existed. '*In such circumstances there may be a more meritorious external candidate but the employer would not have the option of appointing them.*' This impaired the employer's capacity to determine the identity of the persons it wished to employ.
70.8.5	Clause 70.8.5 specifies the minimum numbers of candidates required for each promotional course. If the minimum number has not been met, the MFB cannot conduct a promotional course for the rank in question and cannot promote the existing candidates. It is submitted that this clause impermissibly regulates promotion, under the transfer and promotion limb of Re AEU.
70.8.12 70.8.13 70.8.17	These clauses all regulate the distribution and scope of acting up duties, including by requiring the acting up duties be shared on an equitable basis. It is submitted that these provisions impermissibly regulate the promotion and transfer of employees under the promotion and transfer limb of Re AEU. This is so having regard to the particular nature of duties of firefighters (including Command staff) and the requirement in this context that the MFB be able to appoint the person it sees most suitable to perform the higher role. In addition the second part of clause 70.8.17 is inextricably linked to minimum crewing requirements, discussed above.
74.2- 74.5	See rationale in relation to clause 32.1 to 32.4, which these provisions substantially and, in some cases identically, replicate.
82.1.4 and	These clauses provide a less prescriptive version of clauses 36.1.4 and 36.1.5, requiring a minimum of 112 operational personnel to fill day work positions (clause 82.1.4), who are

Clause	Rationale
82.1.5	not to be counted for the purpose of the minimum crewing requirements (clause 82.1.5). The obligation in clause 82.1.4 applies regardless of how many day work positions exist in the MFB's enterprise. This provision impairs the right of the MFB to determine the number and identity of its employees and the number and identity of employees the MFB wishes to dismiss on redundancy grounds.
82.3.1 to 82.12	As noted above in relation to clause 42.7.3 to 42.7.6, clause 82 of the Operational Staff Agreement imposes a complex web of constraints on the capacity of the MFB to transfer employees for operational or other reasons. These include the prohibition on rostering that adversely impacts on residential or travel arrangements (82.3.2), review and monitoring of rostering issues by the rostering committee (82.3.3) and determinations by the transfer grievance committee (82.12), the method by which vacant positions are to be filled (82.4), limitations on transfers within zones, including the stipulation that employees will not be transferred more than seven times during a three-year rostering cycle without the application of penalty payments (clause 82.5); penalties that apply to inter-zone transfers (82.6), processes for allocating employees to zones (82.7 to 82.9), short and long term platoon changes (82.10 and 82.11). According to Acting ACFO John Jugum (Exhibit MFB-33 at [18]), in practice, the main reasons for transferring employees are: (a) to fill a temporary vacancy (created by employees that are absent because they, for example, are attending training, on leave, or on secondments into projects on day work (special operational duties)); and (b) due to changes requiring particular skills at a fire station at a given time (for instance, to operate specialised equipment). The various outcomes and financial impacts that can arise from rostering and the costs involved has meant that Operational Commanders try not to move people unless absolutely necessary (John Jugum, MFB-33 at [15]). This means firefighters, at times, do not obtain broader experience and understanding of the MFB's operations and equipment. Further, if the minimum crewing limitations were removed, the impact of these provisions would pose an even greater constraint on the MFB's capacity to organise its operations as it sees fit, by limiting the MFB's right to transfer employees to address, for example, the risk profile that exists at a particular time. In light of the nature of the work performed by firefighters, it is submitted that these provisions, particularly when viewed together, amount to an impermissible impairment on the right of the MFB to transfer its employees as it sees fit. As stated by the Full Bench in *Re Teachers (Victorian Government Schools – Interim) Award 1994* [Print M5214]: *'The correct approach generally will be for the Commission to consider the application of the implied limitation to individual award clauses and the award as a whole. An individual clause or group of clauses may not 'offend' the implied limitation in that it or they as a group impair the State's ability to function as a government; however the operation and effect of the whole of the award, the total of each constituent clause, may have such an effect...* *It may also be necessary for the Commission to consider the effect of an award clause or the award as a whole against the particular activities and responsibilities of the cross-section of employees regulated or the nature of the employer's activities...In each case it will be necessary for the Commission to consider the fact of whether, or*

Clause	Rationale
	degree to which, an award and its provisions control a function critical to the State's capacity to function as a government. The operative effect and the purpose of the award in the industrial circumstances are included among the relevant considerations for that purpose.' Alternatively, the following clauses each individually infringe Re AEU principles: 82.3.2 - prohibition against rostering in a way that adversely impacts on residential or travel arrangements (impairment of the right to transfer as the MFB sees fit). 82.4 – the process for filling vacant positions (impairment of the right to transfer as the MFB sees fit. In addition, clause 82.4 prevents the MFB engaging lateral recruits to fill vacant positions (impairment of the right to determine number and identity of employees), by establishing a process for filling such vacancies which is always through the existing workforce). 82.5 – transfers of employees within zones (impairment of the right to transfer as the MFB sees fit). 82.6 – transfers to another Zone (impairment of the right to transfer as the MFB sees fit). 82.7 – rotation of employees (impairment of the right to transfer as the MFB sees fit). 82.8 – allocation of new employees (impairment of the right to transfer as the MFB sees fit and impairment of the right of the MFB to determine term of appointment. In Parks Victoria the Full Bench (at [333]) held that provisions which operate to limit the term of appointment and the location at which employees will be based properly construed as 'pertaining to the... appointment ...of employees in the public sector' within the meaning of s. 5(1)(a) of the Referral Act. The Full Bench went on to say that to the extent that there was any difference between Re AEU principles and s5(1)(a) of the Referral Act, these were not material to the matters considered (see [363] and [364]). 82.9 – promotions (impairment of the right to transfer as the MFB sees fit). 82.10 – short term platoon changes (impairment of the right to transfer as the MFB sees fit). 82.11 – long term/permanent platoon changes (impairment of the right to transfer as the MFB sees fit). 82.12 – transfer grievance committee (impairment of the right to transfer as the MFB sees fit).

Clause	Rationale
90.7.1 and 90.7.3	Clause 90.7 provides that no employee will be relocated or directed to relocate into temporary premises prior to there being agreement reached between the parties as to any necessary temporary facilities and amenities (90.7.1) and the quantum of a per shift allowance in respect of temporary relocations other than to fire stations (which could, for example, include training colleges) (90.7.3). The requirement for agreement in these circumstances may have the effect that the MFB is impaired (and even incapacitated) in relocating or directing employees to relocate to temporary premises, where the UFU's demands are unacceptable to the MFB. These requirements, alone and in combination with clause 90.8 (and 90.9.3) in relation to permanent relocations/deployments, mean that the clause impairs and even has the potential to inhibit the right of the MFB to transfer its employees in accordance with operational and other requirements. As such, it is the MFB's position that these provisions infringe Re AEU principles by impairing the right of the MFB to transfer its employees as it sees fit.
90.8	Clause 90.8 stipulates that no employee can be relocated to any permanent premises prior to there being agreement reached with the UFU as to the design of and facilities and amenities at the new location. For the reasons set out directly above, it is the MFB's position that this clause infringes Re AEU principles. The evidence shows that this provision has previously been used, among other things, to prevent the MFB from relocating an outdated and incorrectly positioned fire station, the relocation of which was proposed due to operational and health and safety concerns, among others (Pearson (MFB-37) at [57]-[86]).
90.9.3	Clause 90.9.3 provides that deployment of staff to a station shall not occur until a range of specified matters have been agreed in respect of that station. Like clause 90.8 this provision impairs the capacity of the MFB to transfer its employees and, it is the MFB's position that this clause infringes Re AEU principles on this basis.
91.3	Clause 91.3 provides that no member of the OSG can be rostered for any of the positions referred to in the chart at Schedule 2 with the exception of the limited number of positions previously agreed between the parties. This provision impairs the right of the MFB to transfer its employees (that is OSG members from day work to shift work), having regard to their capacity and operational requirements. It also impairs the right of the MFB to determine the number of its employees (because the MFB may otherwise be able to fill a position with an OSG member rather than recruiting externally (assuming for example that the limitations on external hires were removed), thus maintaining, rather than increasing, employee numbers).
92.10	See clause 36.7 in relation to seven to the fireground.
Conditions Applying to Fire Service Communication Controllers(FSCCs) only	
112.2 and 112.3, 113.1 and 113.2	These provisions are all interrelated and provide that (a) the MFB must employ a minimum of five FSCCs (113.1); (b) the reliever position to cover absence of rostered staff shall form part of the five FSCCs (112.3); (c) any permanent vacancy will be offered to the person in the reliever position (112.2); and (d) 'FSCCs will be secure in their current location and their job description, as set out in Schedule 8, will be respected subject to changes pertaining to interagency work', such changes to be the subject of negotiation with the UFU (113.2). As with the minimum crewing requirements more generally, clause 113.1 impairs the right

Clause	Rationale
	of the MFB to determine the number of its employees. Along with clause 113.2, clause 113.1 also impairs the right of the MFB to determine the number of employees it wishes to dismiss on redundancy grounds. For example, the MFB must employ at least five FSCCs and may not change the nature of the role (meaning that the role cannot be made redundant). Should the requirement to engage five FSCCs be removed, clause 112.3 would be rendered meaningless. Further, clause 112.2 could be read to impose a positive obligation on the MFB to employ someone in the reliever position, in which case it similarly impairs the right of the MFB to determine the number of its employees. In any event, clause 112.2 impairs the right of the MFB to determine the number and identity of its employees as it may otherwise wish to recruit externally to fill a vacant permanent FSCC position.
116	Clause 116 is in identical terms to clause 74 and in all relevant respects the same as clause 32. See reasons for invalidity set out in respect of clause 32 above.
Schedules to Operational Staff Agreement	
Sch 2	See comments in relation to clause 33. In addition, item 7 of Schedule 2 (which provides the minimum number of particular appliances that must be in commission at any given time) is void and of no effect additionally due to the failure of the provision to pertain to the requisite relationships set out in s 172(1) of the FW Act. The same applies to the crewing chart at Schedule 2, insofar as it details where particular appliances are to be stationed.

Table 2 – ACFO Agreement

Clause	Rationale
19	Clause 19 requires the MFB to 'act up' a Commander to ACFO where, due to absence, the number of available ACFOs falls below 10 for more than 2 weeks. Due to the nature of the roles in question, it is submitted that clause 19 impermissibly impairs the right of the MFB to transfer and promote its employees as it sees fit.
20	Clause 20.2 and 20.3 impair the right of the MFB to transfer ACFOs in accordance with the transfer and promotion limb in Re AEU. Transfer in this context refers to a transfer between functional roles assigned by the Chief Officer to ACOs. The impairment of the right of the MFB to transfer such senior employees to different roles is an infringement of Re AEU principles based on the impairment of the right of the MFB to transfer its employees as it sees fit.
21 and Sch 3	Clause 21 and Schedule 3 duplicate the requirement that there be a minimum of 11 ACFOs. As with the minimum staff obligations contained in the Operational Staff Agreement and for the reasons already set out, this impairs the right of the MFB to determine the number of persons it wishes to employ and the number of employees it wishes to dismiss on redundancy grounds.

Appendix C

Bargaining between the parties

1. Outline

The parties have been bargaining to replace the 2010 Agreements for almost 16 months, with bargaining commencing in April 2013.[124]

The MFB's evidence is that no progress has been made between the parties on any substantive issues since bargaining commenced, with not one clause having been agreed.[125] Bargaining has been protracted with a number of delays.[126] Negotiations have been the subject of three section 240 applications by the UFU, and a grievance raised by the UFU under the dispute resolution clause in the 2010 Agreement before negotiations had even begun.[127]

The MFB has issued a section 229 good faith bargaining application against the UFU in relation to its failure to respond to the MFB's proposals, as well as a further notice regarding the UFU's continued claims for clauses that offend the principle in Re AEU.[128]

The parties are now effectively at an impasse in negotiations. No clauses have been agreed. There is a significant disagreement in relation to content which offends Re AEU, and in relation to the replacement consultation and dispute resolution clauses.[129]

The MFB is of the view that there is little utility in continuing to bargain.[130]

2. Evidence of the parties

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Paul Stacchino (MFB-18) at [39] – [167;
- the reply statement of Paul Stacchino (**MFB-19**) at [5] – [54];
- the reply statement of Peter Rau (**MFB-8**) at [58] – [69]; and
- Transcript PN2314 – Transcript PN2540 (Mr Stacchino).

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Casey Lee (**UFU-23**) at [55] – [151];
- the witness statement of Louis Mele (**UFU-51**) at [16] – [20];

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[124] Statement of Paul Stacchino (**MFB-18**) at [54]
[125] Statement of Paul Stacchino (**MFB-18**) at [47], [54] – [167]; reply statement of Peter Rau (MFB-8) at [60]
[126] Statement of Paul Stacchino (**MFB-18**) at [47]
[127] Statement of Paul Stacchino (**MFB-18**) at [48]
[128] Statement of Paul Stacchino (**MFB-18**) at [51]
[129] Statement of Paul Stacchino (**MFB-18**) at [52]
[130] Statement of Paul Stacchino (**MFB-18**) at [167]; reply statement of Paul Stacchino (**MFB-19**) at [52]

- the witness statement of Ross Trimboli (**UFU-37**) at [20] – [27]; and
- Transcript PN6327 – Transcript PN 6330 and Transcript PN6548 – Transcript PN6555 (Mr Tisbury); Transcript PN9049 – Transcript PN9101, Transcript PN9147 – Transcript PN9232, Transcript PN9350 – Transcript PN9440 and Transcript PN9621 – Transcript PN9631 (Mr Lee); and at Transcript PN11724 – Transcript PN11737 (Mr Trimboli).

3. Analysis of bargaining between the parties

3.1 Commencement of bargaining: April 2013

The MFB commenced bargaining in April 2013. It proposed to replace the 2010 Agreements with two enterprise agreements; one which would cover operational employees up to and including the ranks of Senior Station Officer and Fire Services Communication Controllers, and one which would cover Commanders and Assistant Chief Fire Officers (ACFOs) (**Proposed Agreements**).[131]

At the commencement of bargaining, the MFB informed the UFU that replacement agreements should not contain consultation or dispute resolution clauses which operate as broadly as those in the 2010 Agreements, or content which offends the principle in Re AEU.[132]

Under cross examination, Mr Lee for the UFU agreed that the MFB had made clear in bargaining that it would not agree to matters that infringed the principle in Re AEU:

> *You were aware that the MFB was very concerned to ensure that there was no content that infringed Re AEU, weren't they?---Yes.*
>
> *They made clear in that bargaining that they would not agree matters that infringed the principles in Re AEU, didn't they?---Yes.*[133]

Following the MFB's notice of its intention to commence bargaining in April 2013, the MFB sent a schedule to the UFU and other bargaining representatives setting out a schedule of twenty-five meetings over the following five months.[134]

During those five months, only five bargaining meetings took place, of which the UFU attended three, being on 27 May 2013, 6 August 2013 and 15 August 2013. At those three meetings the MFB evidence is that no substantive bargaining occurred.[135] Indeed, the meeting on 15 August 2013 lasted only 25 minutes, after an allegation by the UFU that the meeting premises contained asbestos, with Mr Mullett of the UFU stating he could '*smell it in the air*'.[136]

The UFU evidence does not address these meetings or put forward any contrary view.[137]

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[131] Statement of Paul Stacchino (**MFB-18**) at [39] - [40], [43] – [44] and [56] – [63]
[132] Statement of Paul Stacchino (**MFB-18**) at [40] – [42-] and [54] – [55]
[133] Lee at PN9213 - PN9214
[134] Statement of Paul Stacchino (**MFB-18**) at [59]
[135] Statement of Paul Stacchino (**MFB-18**) at [60], [68], and [77] – [80]
[136] Statement of Paul Stacchino (**MFB-18**) at [85] – [92
[137] Note Lee at PN9357 – PN9359 stating that he did not attend the bargaining meeting on 15 August 2013

3.2. UFU dispute and two section 240 applications: April – September 2013

From the commencement of bargaining in April 2013 until September 2013, the UFU had lodged two section 240 applications at the FWC and raised a grievance under the 2010 Agreement regarding the MFB's proposed scope for the Proposed Agreements. The MFB evidence is that these events caused substantial delays to bargaining[138]; the UFU disagrees.[139]

Nevertheless, it remains the case that by the end of September 2013, more than five months after the commencement of bargaining:

- the UFU had had the MFB's Proposed Agreements for 5 months;
- no response from the UFU or material on negotiating for replacement agreements had been provided to the MFB;
- only five bargaining meetings had taken place (25 fewer than the number scheduled to occur) of which the UFU had attended three; and
- no substantive bargaining had occurred, this position being unchallenged by the UFU.[140]

What did take place during these months is the attendance by the parties at four conferences regarding the UFU section 240 application at the FWC, as well as an arbitration arising out of the UFU's grievance raised under the 2010 Agreement.[141]

In respect of both the UFU's first section 240 application and the UFU's grievance, these matters were closed in favour of the MFB.[142] In respect of the UFU's second section 240 application, which requested the FWC's assistance in reaching an 'agreed process of bargaining', the matter was re-listed for conference after Commissioner Wilson declined to issue a Recommendation due to the divergence of the parties' positions.[143]

Regarding this matter, the UFU had tabled CFA bargaining meeting protocols at the FWC in seeking Commissioner Wilson's assistance for an agreed process of bargaining. Mr Lee was cross examined on this issue and his evidence was as follows:

> *My learned friend asked you questions last night...You said that the meeting protocols that were being sought were the same as in CFA bargaining. Correct?---The union was seeking bargaining protocols from the same starting point as the bargaining protocols we had sought with the CFA.*
>
> *... I remember some other questions that you answered about the CFA, and it seemed to be your point was if the MFB had agreed, like the CFA did, about bargaining, that that would have progressed bargaining a bit better. Do you remember an answer to that effect?---Yes.*

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[138] Statement of Paul Stacchino (**MFB-18**) at [61]
[139] See reply statement of Paul Stacchino (**MFB-19**) at [23], and Lee at PN9064 – PN9073
[140] Statement of Paul Stacchino (**MFB-18**) at [60], and [98] – [99]
[141] Statement of Paul Stacchino (**MFB-18**) at [64], [72], [93], [95], [103]
[142] Statement of Paul Stacchino (**MFB-18**) at [64] and [73]
[143] Statement of Paul Stacchino (**MFB-18**) at [97]

Well, the CFA bargaining is not going particularly well, is it?---At the moment there's a meeting scheduled for the parties, I think, on Thursday.

The CFA has good faith bargaining orders against the UFU, doesn't it?---Can you explain what you mean?
I will read it again, 'The CFA has good faith bargaining orders made by this commission against the UFU'?---The commission has issued what it called interim orders. I'm not sure if they were good faith bargaining orders or of another type.

The protocols that you refer to haven't been followed since October 2013. Is that correct; in respect of the CFA?---I'm just thinking back through the period. I'm not sure. I'm not sure exactly the answer to that.

It might be right, it might not be, that the protocols haven't been followed since October 2013?---Well, there have been disputes which have arisen in that bargaining. Yes, from at least early 2014 there have been some disputes. And there have been some meetings since then. I'm not sure of whether those protocols were followed or not. I can't - I'm not sure.

Are you aware of the commission recently making a statement in respect of the bargaining between the CFA and the United Firefighters Union of Australia? ---Can you refer me to the statement?

Yes. I will read it. I will read the second paragraph of it, 'The parties have been engaged in bargaining since March 2013 and it appears that little significant progress has been made, although there have been numerous meetings and a considerable amount of material exchanged.' That's what Smith DP has said on 2 July. He's right, isn't he?---Sorry, I was focusing more on whether I recall the statement, and I would ask if you could read it again. I have some recollection that he has made a statement recently. So my answer to your first question is yes. If you could read the statement again and ask the second question.

The second paragraph of the statement says, 'The parties have been engaged in bargaining since March 2013 and it appears that little significant progress has been made, although there have been numerous meetings and a considerable amount of material exchanged.' That's what he has said in the second paragraph of that statement. He's correct, isn't he?---Yes.[144]

3.3 Section 240 conferences: September – November 2014

On 20 September 2013, the MFB wrote to the UFU stating it was concerned that the UFU were not meeting the good faith bargaining requirements under the FW Act. In this letter the MFB sought a formal response to a number of key matters as follows:

(a) the scope and coverage of the Proposed Agreements;

(b) the Statutory exclusions in the Proposed Agreements;

(c) the classifications and duties (safe operations) in the Proposed Operational Employees Agreement 2013;

(d) the 'operations' section (i.e. operational strength and EMR) in the Proposed Operational Employees Agreement 2013; and

[144] Lee at PN9380 – PN9389

(e) MFB's Proposed Agreements or material on negotiating for replacement agreements.145

The UFU's evidence does not address the MFB's concerns, as held at that point in the bargaining process, that the UFU were not bargaining in good faith.

On 26 September 2013, Commissioner Wilson recommended that the parties attend further conferences at which the MFB would present its bargaining proposal, and to which the UFU would respond and put its own position.[146]

The UFU then sought an adjournment of these conferences which were re-listed to later dates.[147]

The MFB presented at conference at the FWC on 31 October 2013, after providing the UFU and bargaining representatives with two Explanatory Memoranda which set out a detailed and lengthy explanation of terms contained in the Proposed Agreements and a Key Bargaining Outcomes Paper which identifies the MFB's key proposed areas of improvement of the Proposed Agreements.

Following the conference, the UFU sent to the MFB a list of 78 questions arising out of the MFB's presentation. The MFB position is that many of the questions were not relevant, or only marginally relevant, to the substantive issues which were the subject of bargaining.[148] The UFU's written evidence does not address this, but under cross examination by Mr Parry QC, Mr Lee stated that he '*may have*' authored the questions and that he does not agree that the 78 questions have very marginal, if any relevance to bargaining. He also stated that asking the 78 questions could have sped the process up.[149]

On 12 November 2013, the UFU presented at the FWC but none of the material responded directly to the MFB's Proposed Agreements and no.[150] No documentation was provided. As stated by Mr Stacchino in his statement (MFB-18) at [113]:

> *My impression of the conduct of the UFU's representatives in this conference was that they did not intend to provide any response to the specific proposals of the MFB and avoided doing so.*

The UFU's evidence does not address this conference, or put forward any contrary view.[151]

The outcome of these conferences, arising from the UFU's second section 240 application, was that Commissioner Wilson issued a further Recommendation that the parties continue bargaining and deal with the following matters:

(f) the MFB's responses to the UFU's questions as provided by the UFU on 4 November 2013 and 6 November 2013;

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[145] Statement of Paul Stacchino (**MFB-18**) at [100]
[146] Statement of Paul Stacchino (**MFB-18**) at [103] – [104]
[147] Statement of Paul Stacchino (**MFB-18**) at [105]
[148] Statement of Paul Stacchino (**MFB-18**) at [106] – [112]
[149] Lee at PN9372 – PN9373
[150] Statement of Paul Stacchino (**MFB-18**) at [113] – [114]
[151] Statement of Casey Lee (**UFU-32**) at [87]

(g) the MFB's proposed coverage of employees by two separate agreements;

(h) standard future agenda items;

(i) forward calendar of meeting dates and times; and

(j) document the agreed items in the meeting.[152]

3.4 Bargaining in November 2013 and December 2013

Between 26 November 2013 and 10 December 2013 the parties attended four bargaining meetings. The MFB evidence is that the majority of each meeting was taken up with discussion initiated by the UFU in relation to bargaining protocols or meeting processes, and questions put by the UFU which had little relevance to substantive bargaining.[153] The evidence of Mr Lee is that '*this is an overstatement*'[154] but this does not accord with the evidence of Mr Stacchino as set out in his initial statement (MFB-18) at [127] – [132] and his reply statement (**MFB-19**) at [24] – [31].

Under cross examination in this regard and, in particular the meetings on 28 November and 3 December 2013 where the parties got through only clauses 1.1 – 2.4 of the Proposed Operational Employees Agreement, Mr Lee's evidence included the following:

> *Mr Stacchino also gave evidence in his first statement at paragraph 127, 128 and 129. This concerns meetings that took place 28 November and 3 December. I will read paragraph 129. Paragraph 128 refers to a number of clauses: Title, Period of Operation, Coverage of Agreement; and 29 reads - and I quote this, 'Much of the discussion on these clauses consisted of the UFU asking questions which had little relevance to substantive bargaining, such as, 'Why did you remove the UFU from the title of the proposed operational employees agreement; what is an ideological or philosophical view to remove the UFU from the title of the proposed agreement; what is the head of power that allows the MFB to be called the Metropolitan Fire Brigade?' There was a bit of time taken up discussing these things, wasn't there?---Yes.*
>
> *Can you - again, they're matters that are really of marginal value to advancing bargaining, aren't they?---Are you referring to those three questions?*
>
> *Yes, the debate about the title?---No.*[155]

On the evidence given, the parties do not agree on the matter of whether the UFU's questions asked at these meetings had little relevant to bargaining.[156]

In the meeting on 3 December 2013 the UFU provided, for the first time, a draft UFU log of claims (**UFU Draft Agreement**).[157]

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[152] Statement of Paul Stacchino (**MFB-18**) at [115] – [116]
[153] Statement of Paul Stacchino (**MFB-18**) at [127] and reply statement of Paul Stacchino (**MFB-19**) at [32] – [34]
[154] Statement of Casey Lee (**UFU-32**) at [93]
[155] Lee at PN9372 – PN9376
[156] Statement of Paul Stacchino (**MFB-18**) at [127] and reply statement of Paul Stacchino (**MFB-19**) at [32] – [34]; statement of Casey Lee (**UFU-32**) at [96] and [99], and Lee at PN9092 and PN9372 – PN9376
[157] Statement of Paul Stacchino (**MFB-18**) at [130]

The next bargaining meeting was on 10 December 2013 where, like at the meeting on 3 December 2013, the MFB evidence is that there was again only minimal progress made, and where much of the meeting was again taken up with the UFU raising issues around meeting protocol.[158]

On 12 December 2013 the MFB applied to the FWC for a bargaining order under section 229 of the FW Act, which included concerns that the UFU had not responded to the MFB's proposals in a timely manner and was acting capriciously or unfairly so as to undermine bargaining, contrary to the requirements of the FW Act.[159] Following receipt of the UFU's response to the MFB's Proposed Agreements and the UFU's conduct in bargaining meetings in February 2013, the MFB withdrew this application on 21 February 2014.[160]

The MFB evidence is that the final bargaining meeting of 2013, on 19 December, was very adversarial and unproductive in nature.[161] As stated at [140] of the statement of Mr Stacchino (**MFB-18**):

> *The UFU were aggressive, there were lots of raised voices, and I believe it was a deliberate attempt to turn the meeting into a farce so that they could justify their request for bargaining protocols the next time they went before the FWC.*

The UFU's evidence does not address this bargaining meeting, or put forward any contrary view.

At that meeting, nine months after receiving the MFB's Proposed Agreements, the UFU provided a form of response through a 'UFU Document of Further Response', and a document titled 'Themes'.[162]

3.5 Bargaining in January 2014 – June 2014

In 2014, the parties have attended a further seven bargaining meetings. The MFB's evidence is that there are some key and seemingly irrevocable differences between the parties.[163]

In January 2014 the MFB provided a detailed written response to the UFU Draft Agreement provided on 19 December 2013.[164] The response explained whether the MFB accepted or rejected each clause, with reasons set out in each case. The MFB rejected the vast majority of the UFU's clauses, many of which contained content which the MFB had indicated could not be included in the enterprise agreement, such as content which offended the principle in Re AEU and content which inconsistent with or unenforceable under the FW Act.[165]

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[158] Statement of Paul Stacchino (**MFB-18**) at [127] – [129] and [138]; reply statement of Paul Stacchino (**MFB-19**) at [35] – [37]
[159] Statement of Paul Stacchino (**MFB-18**) at [138] and **PS-44**
[160] Statement of Paul Stacchino (**MFB-18**) at [145]
[161] Statement of Paul Stacchino (**MFB-18**) at [139]
[162] Statement of Paul Stacchino (**MFB-18**) at [141]; statement of Casey Lee (UFU-32) at [108]
[163] Statement of Paul Stacchino (**MFB-18**) at [144] and [146]
[164] **PS-2** to the reply witness statement of Paul Stacchino (**MFB-19**)
[165] Statement of Paul Stacchino (**MFB-18**) at [147]

The MFB consistently reiterated to the UFU in both bargaining meetings and substantive correspondence that the replacement agreements could not contain content which offends the principle in Re AEU, and that the MFB would not negotiate on this content.[166] The MFB also made clear to the UFU that it expected the UFU to provide a re-cast log of claims which removed such content.[167] The UFU did not agree that it would cease negotiating on such content and, on 18 February 2014, the MFB put the UFU on notice that it considered by doing so the UFU was not meeting the good faith bargaining requirements under section 228 of the FW Act.[168]

The MFB evidence is that the UFU has refused to withdraw claims which offended Re AEU.[169] On 27 February 2014 the UFU filed a further section 240 application at the FWC, the result of which was a further conference at the FWC, where the MFB agreed to further elaborate on which content in the UFU Draft Agreement offended the principle in Re AEU.[170]

The MFB sent a letter to the UFU on 11 March 2014 setting out in detail the clauses in the UFU log which it considered offended Re AEU.[171] In response the UFU re-cast some of its clauses including a draft consultation clause. The draft consultation clause had the same breadth and scope of that in the 2010 Agreement, including that decision making be by consensus.[172]

The MFB also made clear during bargaining in 2014 that the MFB wanted to progress bargaining on three threshold issues which were major issues for the MFB.[173] These threshold issues are:

> *(A) Consultation. The MFB will not concede to a consultation provision which contains a requirement that decisions can only be made by agreement/consensus between the parties, or that requires consultation on all or any change.*
>
> *(B) Dispute resolution. The MFB will not concede to a dispute resolution clause which applies to all matters pertaining to the employment relationship, and which requires the MFB to maintain the 'status quo' in place prior to any grievance arising.*
>
> *(C) Classifications in the context of external recruitment.*[174]

The MFB sees little utility in deferring discussions about these matters to later in the bargaining process – these matters are fundamental to any new agreement and the MFB's bargaining team have been instructed by senior management that the MFB will make no concessions in relation to them.[175]

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[166] Statement of Paul Stacchino (**MFB-18**) at [148], [151], [154], [158]
[167] Statement of Paul Stacchino (**MFB-18**) at [152]
[168] Statement of Paul Stacchino (**MFB-18**) at [155] and **PS-51**
[169] Statement of Paul Stacchino (**MFB-18**) at [159]
[170] Statement of Paul Stacchino (**MFB-18**) at [160] – [162]
[171] Statement of Paul Stacchino (**MFB-18**) at [162]; see **PS-54** to **MFB-18**
[172] Statement of Paul Stacchino (**MFB-18**) at [164]; see **PS-55** to **MFB-18**
[173] Statement of Paul Stacchino (**MFB-18**) at [155] and **PS-51**
[174] Reply statement of Paul Stacchino (**MFB-19**) at [16] and [40]
[175] Reply statement of Paul Stacchino (**MFB-19**) at [11] and [17]; reply statement of Peter Rau (**MFB-8**) at [62] – [63]

The parties attended a further bargaining meeting on 29 April 2014. The MFB evidence is that the meeting was unproductive and the parties remain as far apart as ever on both the Re AEU and consultation issues.[176]

The UFU sent the MFB a revised log of claims on 9 May 2014,[177] and the MFB sent a further detailed response on 6 June 2014 (**PS-3** to **MFB-19**).[178] The UFU revised log was intended to address the MFB's concerns regarding Re AEU content. However, the MFB evidence is that the log still contained a large number of provisions in breach of Re AEU.[179] Under cross examination Mr Lee, as regards, the MFB's response to the UFU's revised log agreed that it was comprehensive:

> *It is a letter in which the MFB deals comprehensively with your redraft, doesn't it?---It responds to the redraft.*
>
> *Yes. And the way it responds is there's a covering letter, and then there is a response which continues for some 200 pages, dealing with each and every part of the UFU log, doesn't it?---Yes.*[180]

Under cross examination regarding the UFU's revised log and, in particular, the threshold consultation and dispute resolution clauses, the evidence of Mr Lee for the UFU was as follows:

> *And we further move on to clause - I think it's on page 337 - Consultation. Your consultation clause is again identical, I think, to what's in the 2010 agreement, isn't it?---It's not - I'm not sure that it's identical, but on scanning it, it looks very similar.*
>
> *Yes. And the dispute resolution clause on page 340, clause 21, can we suggest it's essentially the same as the one that exists now, isn't it?---We've changed a couple of bits, including - there are some similarities and some changes, too.*
>
> *It has still got the status quo in there, hasn't it?---Yes.*[181]
>
> ...
>
> *Whilst we're with annexure PS3, I think if we move on forward to page 383, this is Uniforms, Appliance and Equipment. I think we can fairly safely assume that you are maintaining your position that the MFB and UFU must agree on all aspects of articles of clothing, equipment, technology, station wear and appliances. That's a maintained position, isn't it?---Yes.*

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[176] Statement of Paul Stacchino (**MFB-18**) at [165]
[177] Statement of Paul Stacchino (**MFB-18**) at [166]
[178] Reply statement of Paul Stacchino (**MFB-19**) at [19]; at **PS-3** to **MFB-19**
[179] Reply statement of Paul Stacchino (**MFB-19**) at [19]
[180] Lee at PN9393 - PN9394
[181] Lee at PN9420 – PN9422

Yes. These provisions about existing consultation mechanisms and the existing procedures and agreement on uniforms and PPC, those are positions that the unions are very committed to, aren't they?---Yes.[182]

In fact, the evidence of Mr Lee under cross examination was that the UFU are basing their log of claims on the current 2010 Agreement, and that it was 'nonsensical' not to:

Can I suggest the effect of your redrafted clauses is to essentially simply maintain the claims you make, and which are derived from the existing 2010 agreement?

---I don't agree with that.

You see, as you said, I think you told the commission yesterday it is nonsensical not to base a new agreement on the previous agreement. And what I'm suggesting is that's exactly what you're doing. Do you accept that?---Are you asking if the union is basing its new claims on its old claims?

Yes?---Yes, that's true.[183]

This was also the evidence of the MFB, with Mr Stacchino stating under cross examination the following:

Do you say that the clause that they have put forward in their proposal is different to what's in the 2010 agreement?---It still goes to the heart of the issue that is about consensus and the requirement for agreement.

Yes it's the same, isn't it?---So I would say the absolute principle and the tenor that exists within the 2010 EA has been carried through within the proposal of the union to date.[184]

In the context of the MFB seeking replacement agreements that are aligned with the emergency management reform program, and which give the MFB '*greater control over its resources and which enable the MFB to be an active contributor*' to such change[185], the UFU's approach as articulated by Mr Lee does not bode well for the parties' prospects of reaching agreement.

The last bargaining meetings attended by the parties were on 20 May 2014 on 10 June 2014.[186] The parties disagree on whether these meetings were productive.[187] The evidence of the MFB is

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[182] Lee at PN9428-PN9429
[183] Lee at PN9899 – PN9401; and PN9057
[184] Stacchino at PN2368
[185] Reply statement of Paul Stacchino (**MFB-19**) at [14] – [15]; Stacchino at PN2503
[186] Reply statement of Paul Stacchino (**MFB-19**) at [49]; statement of Casey Lee (**UFU-23**) at [132] – 135] and [147]
[187] Reply statement of Paul Stacchino (**MFB-19**) at [46] - [49]; statement of Casey Lee (**UFU-23**) at [127] – [132]; Lee at PN9093 - 9096

that '*what occurred at the meeting on 10 June 2014 was not bargaining*'. [188] The UFU evidence is that '*bargaining has continued*'.[189]

The UFU is yet to either withdraw impermissible content from its log of claims, or provide detailed written reasons as to why the content is permissible. The UFU's second log of claims continued to contain:

- '*a consultation clause which requires that decision making is by consensus and that the parties must consult on all matters*'; and
- '*a dispute resolution clause which requires the MFB to maintain the 'status quo' in place prior to the grievance arising*'.[190]

The MFB position, informed and instructed by the MFB Board, including the MFB President, Neil Comrie, and the MFB Chief Executive Officer, Jim Higgins, is that the MFB will not accept any replacement agreement which contains any such content. Accordingly, on the evidence of the MFB, it is difficult to see how any agreement can be reached in the foreseeable future.[191]

The evidence of the UFU is that the MFB '*has refused to bargain about anything other*' than the threshold issues, and that the MFB will not bargain on '*impermissible content*'.[192] The MFB disputes this position – the MFB has provided two detailed responses to the two UFU logs of claims (provided in December 2013 and May 2014) encompassing all clauses.[193] Nevertheless:

...it continues to be the MFB position that the three threshold issues should be addressed in bargaining first before moving onto other matters.[194]

The MFB position is furthermore that it simply cannot agree to a enterprise agreement that has content which offends the principle in Re AEU. As stated by Mr Stacchino under cross examination:

> *But is it bargaining?---I'd like to answer the question. The point being is that there - the Tribunal will not sign off an agreement with impermissible material.*
>
> ...
>
> *You don't know what the outcome will be and you also didn't know what the potential on your claim might be if the case was decided one way or the other?*
>
> *---Currently, we can't put together - we can't get an in-principle agreement on an EA with impermissible material, Mr Borenstein.*[195]

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[188] Reply statement of Paul Stacchino (**MFB-19**) at [49]
[189] Statement of Casey Lee (**UFU-23**) at [147]
[190] Reply statement of Paul Stacchino (**MFB-19**) at [42] and [51]; reply statement of Peter Rau (**MFB-8**) at [64] – [66]
[191] Reply statement of Paul Stacchino (**MFB-19**) at [17], [41] – [42]; reply statement of Peter Rau (**MFB-8**) at [61] – [63] and [68]
[192] Statement of Casey Lee (**UFU-32**) at [72] and [74]
[193] Reply statement of Paul Stacchino (**MFB-19**) at [18] – [20]; Stacchino at PN2405 – PN2407
[194] Reply statement of Paul Stacchino (**MFB-19**) at [20]; Stacchino at PN2369 – PN2378

3.6 Conclusion

The MFB has been bargaining for replacement agreements for almost 16 months. The MFB evidence is that:

- no substantive progress in bargaining has been made during this time;[196]
- the process has been long and protracted with numerous delays;[197]
- the parties are, as at June 2014, as far apart as ever;[198] and
- appear to have irreconcilable differences with regards to content that is of significant importance to the MFB for the management of the organisation and its ability to align itself with the reforms to emergency management which are being implemented over the coming years.[199]

[195] Stacchino at PN2392 and PN2480. See also PN2482
[196] Statement of Paul Stacchino (**MFB-18**) at [47], [54] – [167]; reply statement of Peter Rau (**MFB-8**) at [60]
[197] Statement of Paul Stacchino (**MFB-18**) at [47]
[198] Statement of Paul Stacchino (**MFB-18**) at [144] and [146]
[199] Statement of Paul Stacchino (**MFB-18**) at [144] and [146]; Reply statement of Paul Stacchino (**MFB-19**) at [14] – [15]

Appendix D

Issue regarding relocation of Northcote fire station

1. Outline of issue

The MFB has through a number of reviews, including the Strategic Location Plan, identified that Northcote fire station needs to be relocated to an area east of its current location in order to improve emergency response service to certain areas within the MFD.[200] Additionally, Northcote fire station is an old station with a number of limitations, including that it is a two-store fire station with egress near a major shopping strip precinct, which are undesirable from a health and safety perspective.[201] Accordingly, in 2010 the MFB began looking for a new site, allocating $5 million to the project.[202]

In April 2011 the MFB identified an appropriate site on which to relocate the station.[203] In December 2012 the funding for the project was lost as there was no agreement between the MFB and the UFU to purchase the site.[204]

2. Relevant provisions of the 2010 Agreement

Clause 90.8 - Relocation:

> *'No employee will be relocated or directed to relocate into any permanent premises (e.g. a new location, station or training college) prior to there being agreement reached between the parties as to the design of and facilities and amenities at the new location.'*

Clause 90.9.3 – New stations:

> *'Deployment of staff to a particular station shall not occur until infrastructure, furnishings, fittings and all deployment principles and matters have been agreed to in respect of that station.'*

Clause 13 - Consultative process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Gregory Pearson (MFB-37) at [57] - [86];
- the reply witness statement of Gregory Pearson (**MFB-39**) at [22] – [42]; and
- Transcript PN4872 – Transcript PN4914 (Mr Pearson).

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[200] Statement of Gregory Pearson (**MFB-37**) at [59] – [63]
[201] Statement of Gregory Pearson (**MFB-37**) at [57] – [59]
[202] Statement of Gregory Pearson (**MFB-37**) at [64] – [65]
[203] Statement of Gregory Pearson (**MFB-37**) at [70]
[204] Statement of Gregory Pearson (**MFB-37**) at [82]

The MFB had identified a site for the relocation of Northcote fire station and consulted with end-users about that site. Issues raised in consultation were discussed at length over a long period of time[205] and would have been able to be addressed or mitigated if the project proceeded.[206] As set out in Mr Pearson's reply witness statement (**MFB-39**) at [25] and [26]:

> *'The MFB is happy to hear the end-users and UFU views on this but it is ultimately the MFB which has to consider all the information and, as the organisation responsible for providing emergency services, must be able to form a view and decide where to locate its firestations.*
>
> *The MFB must provide suitable coverage to the whole MFB fire district, not just to areas where demand is high but which are already covered by other firestations. In this situation the end-users and UFU disagreed with the MFB's strategy, and hence the MFB did not have the ability to implement its own SLP because it is unable to make a decision where the end-users have a different opinion.'*

The MFB was unable to purchase the land unless it had the agreement of the UFU. As set out in the statement of Pearson (**MFB-37**) at [84] – [85]:

> *'The biggest concern with the Northcote project was that the MFB had identified that a new fire station needed to be built in a preferred area. Due to the extensive consultation requirements and need to seek agreement from the UFU in the Consultative Committee, this ultimately didn't mean anything, as the final decision as to whether to relocate ultimately lay in the hands of end-users, not the organisation itself.*
>
> *If the MFB had gone ahead and purchased the land anyway, it would have been near impossible to then get the UFU to agree to the design and construction of a station, let alone then occupy it as it would have been against some of the end-users views. I am aware the MFB has gone through such an experience previously in respect of the Altona fire station relocation, where land was purchased and the slab laid, but was abandoned when no agreement was reached.'*[207]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Robert Psaila (UFU-21) at [151] – [185]; and
- Transcript PN8984 – Transcript PN8989 (Mr Psaila).

The UFU position is that there were concerns with the site raised by end-users, which included the location of the site and that:

> *'The major problem with access was that to gain access from the rear of the site, would have required fire trucks driving through a public access parking area. This parking area was adjacent to a play ground near the Fairfield boatshed, and frequented by children accessing the play ground. This was the main concern regarding the MFB's proposed location.'*[208]

Under cross examination Mr Tisbury and Mr Psaila agreed that:

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[205] See, for example, Pearson at PN4877

[206] See, for example, Pearson at PN4901 - PN4912.

[207] See also, for example, PN4876, PN4899, PN4914

[208] Statement of Robert Psaila (**UFU-21**) at [170]

- the MFB locates its fire stations according to a strategic plan[209];
- the strategic plan is a comprehensive process, and fire stations are placed where they will best meet the MFB's strategic needs[210];
- the strategic plan evolves from time to time[211];
- it is important that the MFB places those stations where it thinks it's appropriate[212]; and
- under the 2010 Agreement, despite the MFB considering that a particular location for a station is appropriate, if end-users don't agree such a proposal to build a new station can be blocked[213].

5. Operation of the 2010 Agreement

The effect of the operation of clauses 90.8, 90.9.3 and clause 13 of the 2010 Agreement is that, absent agreement of the UFU the MFB is unable to relocate or build new fire stations in locations it identifies as appropriate.

6. Effect of the issue

The evidence from both the MFB and the UFU is clear:

(a) the MFB seeks to locate its fire stations according to a strategic plan;[214]

(b) locations have been so devised to enable the MFB to respond to incidents within 7.7 minutes on average 90% of the time;[215]

(c) the strategic plan evolves from time to time to ensure that locations are appropriate to meet the needs of the community;[216] and

(d) it is important that the MFB place its stations where it thinks appropriate.[217]

Yet, as a direct result of the requirement to reach agreement with the UFU under the 2010 Agreement the MFB was unable to relocate Northcote fire station to a location considered more appropriate under its strategic location plan. This had the effect that:

(a) the MFB was not able to relocate the Northcote station to a site considered more beneficial to community needs, health and safety. The MFB was unable to secure the site without the agreement of the UFU and lost the allocated $5 million in funding;

(b) The Northcote station remains, along with its irreparable design limitations, which, among other things, continue to pose health and safety risks to firefighters and the community.

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[209] Tisbury at PN6878 and Psaila at PN8985
[210] Tisbury at PN6879 and Psaila at PN8986
[211] Tisbury at PN6880 and Psaila at PN8987
[212] Tisbury at PN6881 and Psaila at PN8988
[213] Tisbury at PN6882 and Psaila at PN8989
[214] Rau at PN450, Walker at PN4087-8, Tisbury at PN6878-9, Psaila at PN8985
[215] Rau at PN450, Walker at PN5341
[216] Walker at PN5339, Tisbury at PN6880, Psaila at PN8987
[217] Tisbury at PN6881, Psaila at PN8988, Weir at PN11635

UFU and MFB witnesses agreed that, despite the importance to the community of the MFB being able to locate stations in accordance with its strategic location plan, under the 2010 Agreement end users were able to block such relocation for any, or no, reason.[218]

Whilst firefighters at stations may have their own opinions which would ordinarily be taken into account in any consultation process,[219] it is a poor outcome for the community, the brigade and its firefighters for those opinions to operate as a veto. That is, however, the position as it stands under the current 2010 Agreement. This outcome is not in the interests of the MFB, the firefighters or the community.[220]

[218] See for example Tisbury at PN6882, Psaila at PN8989, Pearson at PN4819

[219] See, for example, reply statement of Greg Pearson (**MFB-39**) at [25], Rau at PN267 and Youssef at PN1253

[220] See, for example, Hamilton at PN7464, Carter at PN10934 – PN10935, and Walker at PN5334 and PN5341

Appendix E

Long duration breathing apparatus training course

1. Outline of issue

In 2010, the MFB sought to develop a course for firefighters to be trained in the use of long duration breathing apparatus.[221] The Brigade Medical Officer (**BMO**) agreed that the effective monitoring of core temperature should be mandatory on the courses.[222]

Commander Andrew O'Connell proposed monitoring core temperature by using the VitalSense monitoring system. This system involved participants swallowing an ingestible pill (the **Jonah Capsule**) which contained a thermometer and a Bluetooth transmitter. The technology enabled firefighters' core temperature to be monitored in real time. There were no other appropriate ways of accurately monitoring core temperature. The MFB spent approximately $60,000 purchasing the VitalSense monitoring system.[223]

On 30 September 2010, at a consultative committee meeting, the UFU indicated that they did not support the requirement for course participants to take the Jonah capsule.[224] Agreement was never reached to use the Jonah Capsule and in the end, the course ran in a modified fashion without core temperature being monitored.

2. Relevant provisions of the 2010 Agreement

Clause 13 - Consultative process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [155] - [201];
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [7] - [36] and [56] – [63]; and
- Transcript including at Transcript PN3095 – Transcript PN3166, Transcript PN3238 – Transcript PN3250 and Transcript PN3328 – 3329 (Mr O'Connell).

The MFB's position was that the course as proposed in early 2010 could not safely run without using the Jonah capsule. As set out at [17] of Mr O'Connell's reply statement (**MFB-26**):

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[221] Statement of Andrew O'Connell (**MFB-25**) at [155] – [156]
[222] Statement of Andrew O'Connell (**MFB-25**) at [160]
[223] Statement of Andrew O'Connell (**MFB-25**) at [167] – [174]
[224] Statement of Andrew O'Connell (**MFB-25**) at [188]

'*...the BMO had made it very clear that the MFB could not ensure course participants' safety without using the capsule.*'[225]

The BMO advised that the technology was safe.[226] The Cambridgeshire Fire Service in the United Kingdom also confirmed that it was successfully using the technology.[227]

The UFU requested that the MFB procure medical advice from a doctor at the Epworth hospital to confirm the safety of the capsule. However, the UFU was not forthcoming in providing contact details of this doctor.[228]

The MFB was also of the view that the UFU had previously agreed that the Jonah capsule could be used on the course, which is why the MFB purchased the equipment.[229] Indeed, EBIC minutes of meeting show that in June 2010 Mr Marshall agreed that core temperature monitoring was necessary, and Mr Hamilton wanted the '*highest possible standard of screening as advised by the BMO.*'[230]

In September 2010, the UFU objected to the mandatory use of the Jonah capsule on the training course.

The MFB did not consider that the use of the Jonah capsule was compulsory. Only participants on the course were required to take the capsule[231] and course participants with pre-existing bowel conditions were exempt from taking the capsule.[232]

Ultimately the UFU refused to endorse the use of the Jonah capsule on the training course. As a result, the course had to be run in a modified way which relied on course participants retiring from the exercise when they felt too hot. As set out in Mr O'Connell's statement (**MFB-25**):

'(The modified training) *is not reflective of an environment that reflects the actual conditions to which a firefighter might be subject in an emergency. ...You can develop training so people never get to the point of getting themselves sick, but that is not a reflection of reality in terms of the operations firefighters undertake.*

...Training which does not present a risk to core temperature will not adequately prepare our firefighters for the role they may be required to perform.'[233]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Michael Tisbury (**UFU-14**) at [109] - [120];
- the witness statement of Mark Lyons (**UFU-32**) at [3] - [48]; and
- the transcript including at Transcript PN3095 – Transcript PN3166 (Mr O'Connell); Transcript PN7197 – Transcript PN7214 (Mr Tisbury); Transcript PN7261 – Transcript

[225] See also statement of Andrew O'Connell (**MFB-25**) at [190].
[226] See, for example, statement of Andrew O'Connell (**MFB-25**) at [181] and [183].
[227] See statement of Andrew O'Connell (**MFB-25**) at [179].
[228] See statement of Andrew O'Connell (**MFB-25**) at [182].
[229] See statement of Andrew O'Connell (**MFB-25**) at [171] – [172].
[230] See statement of Andrew O'Connell (**MFB-25**) at [186] and reply statement of Andrew O'Connell (**MFB-26**) at [56].
[231] See statement of Andrew O'Connell (**MFB-25**) at [191].
[232] See O'Connell at PN3121.
[233] See statement of Andrew O'Connell (**MFB-25**) at [197] and [199].

PN7264 (Mr Tisbury); Transcript PN11102 – Transcript PN11128 and Transcript PN11147 – Transcript PN11284 (Mr Lyons)

According to Mr Lyons, the UFU supported monitoring core temperature but it had concerns about the use of the Jonah capsule, including:

- the safety of the capsule;
- the benefits in taking the capsule; and
- whether taking the capsule needed to be compulsory.

Mr Tisbury says that the UFU's concern was particularly in respect of participants with bowel conditions.

The UFU says that MFB management also had concerns about the compulsory nature of the Jonah capsule.

However, under cross examination by Mr Wheelahan, Mr Lyons agreed that he was unaware it was the MFB's position that participants with bowel conditions were not required to take the capsule, and he was unable to dispute Mr O'Connell's evidence in respect of the BMO's position:[234]

> *All right. Well, the evidence in this proceeding, Commissioner, on Friday, 11 July at transcript PN3121, Mr O'Connell was cross-examined and he was asked this question, 'So if they wanted to take the course but they didn't want to take the capsule, they wouldn't be able to take the course on your scheme.' And Mr O'Connell answered, 'Unless they had a pre-existing bowel condition. On that point, the brigade medical officer was comfortable to allow them not to take the tablet provided everybody else in that course did so where you could have some way of extrapolating some data to make sure that their core temperature wasn't exceeded.' Now, are you aware that was the position or you just don't know?---I don't know.*
>
> *You don't know?---No, my position was, sitting next to Andrew at the EBIC meeting when Tony Trimble said to him, 'So you're telling us that we can't - that people can't undertake this course without using the pill,' and Andrew's response was, 'Yes.'*
>
> *Yes, but beyond that, though, have you seen any of the correspondence for the doctor, Dr - is it Wadsley?---Wadsley.*
> *You haven't seen any of it?---No, not that I'm aware of.*
> *So you're therefore not in a position to dispute Mr O'Connell's evidence about what the brigade medical officer's position was with respect to taking the Jonah capsule, are you?---No; only based on his statement.*

Mr Lyons was also taken to an article in the UFU's publication, the Australian Firefighter Magazine, in relation to the importance of monitoring core temperature:[235]

> *You accepted that in the ACT that their evidence based approach was consistent with best practice. Correct?---Correct.*

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[234] See Lyons at PN11148 – PN11152.
[235] See Lyons at PN11259 – 11260.

It follows, then, doesn't it, that the MFB or UFU approach in Victoria is not consistent with the best practice by not using an ingestible pill to measure core temperature?---Correct.

Mr Lyons also says that the training course was not completed when he became involved with the project and the course was therefore able to proceed. On that basis, he says that the UFU could not endorse the training, regardless of the Jonah capsule.

Mr Tisbury agreed in cross examination,[236] however, that the course couldn't commence until the material had been approved by the UFU:

All right. You then make some criticisms about training materials not being complete. Mr O'Connell agrees with you that training materials were not complete, but then he sets out the reason why, and he says that it was because he couldn't get agreement on what needed to be in them until you agreed on the training content. That's correct?---That's absolutely garbage. I'm not the subject matter expert in long duration breathing apparatus. I can't tell them what to put in the training manual. It's his job as the project coordinator to go in, develop the training material and present it. It's not my job to tell him what to put in it.

But it's your job on the committee to provide your approval to that material?

---After it's been completed, mate.

Yes, and it's your job to approve it?---That's correct.

That's your position?---Yes.

He agrees that the course can't commence until that material is completed. You agree with that?---Yes.

You add not only completed but approved by you and your sub-committee?

---Yes, who comprise both MFB management and the UFU.

So that's a yes?---Yes.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that, absent the agreement of the UFU, the MFB was unable to run the long duration BA training course using the Jonah capsules.

6. Effect of the issue

As a result of the UFU effectively blocking the use of the Jonah capsule for the long duration training course:

(a) the MFB was unable to use the Jonah capsules in running the long duration breathing apparatus course;

(b) as a result, the training course had to be modified;

(c) the modified course provided a lesser form of training for firefighters;[237] and

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[236] See Tisbury at PN7208 – PN7214.

[237] See statement of Andrew O'Connell (**MFB-25**) at [197] and [199].

(d) MFB and UFU practice in Victoria is not consistent with what was agreed by both parties to be best practice in monitoring core temperature.

Further, the MFB spent a significant amount of money purchasing the equipment for the Jonah capsules. Those resources were wasted, which, as Mr Lyons said in cross examination, was not a good outcome.[238]

[238] See Lyons at PN11196 – PN11199.

Appendix F

Multi-agency appliance display at Knox

1. Outline of issue

The Knox multi-agency appliance display was a large multi-agency event scheduled to take place in April 2012. Usually, all Victorian emergency services agencies attend the event.[239]

Three days prior to the event, the UFU lodged a grievance in relation to the event. The UFU also issued a bulletin advising that the members should not participate in the event due to the grievance in place and the status quo provisions.[240]

Due to the grievance, no MFB appliances attended the Knox multi-agency display, other than the MFB's new breathing apparatus appliance, which was taken by Commander O'Connell.[241]

2. Relevant provisions of the 2010 Agreement

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

Clause 19 – Dispute Resolution

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [18] – [39]; and
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [66].

The MFB's position at the time was that consultation with the UFU was not required before multi-agency events. Consultation with the union prior to multi-agency events was not the usual practice and had not been done in the past.[242] Indeed, an event similar to the Knox multi-agency

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[239] Statement of Andrew O'Connell (**MFB-25**) at [18].
[240] Statement of Andrew O'Connell (**MFB-25**) at [18], [25] – [26] and [32] – [33].
[241] Statement of Andrew O'Connell (**MFB-25**) at [36].
[242] Statement of Andrew O'Connell (**MFB-25**) at [17].

display took place at the same venue in 2010. At that time, the UFU was not notified of the event or consulted, and the event ran without incident.[243]

The UFU's grievance raised a range of issues, many of which were not relevant to the event.[244]

Further, career staff from the CFA (many of whom are UFU members) attended the event without incident. The MFB found it surprising that the UFU did not raise concerns in respect of the CFA employees attending the event.[245]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Danny Ward (**UFU-19**) at [59] – [64]; and
- transcript including at Transcript PN8019 – Transcript PN8119, Transcript PN8154 – Transcript PN8176 (Mr Ward) and Transcript PN9601 – Transcript PN9617 (Mr Lee).

The UFU's position appears to be that the MFB did not consult with the UFU in respect of the multi-agency exercise, that the MFB must consult before a multi-agency event can take place, and that if the UFU disagrees with an element of a multi-agency display, the UFU can veto attendance at the event through the dispute resolution provisions of the 2010 Agreement. As Mr Ward said under cross examination at Transcript PN8031 - Transcript PN8032:

> *Again, the question is: is it your position or your understanding of the position that if there had been consultation or there was to be consultation about a multi agency exercise and the UFU did not agree for any reason, then that multi agency exercise could not proceed?---No, you're right, under the agreement we both signed.*
>
> *Under that agreement, if the UFU disagreed in consultation with the multi agency exercise taking place, it's your understanding the exercise would not take place?*
>
> *---It's very hard for me to say yes or no, but I suppose you're right, yes.*

The UFU's grievance raised a range of concerns in respect of the event. The UFU emphasised a number of these concerns again at a meeting between Mr Lee of the UFU and ACFO David Bruce and DCO David Youssef of the MFB on 20 April 2012, two days before the event was due to occur.[246] However, it is unclear how many of those concerns related to the event at Knox.

The MFB provided assurances around the UFU's concerns at the meeting on 20 April 2012. These assurances were emphasised in an email sent by DCO Youssef on 22 April 2012.[247]

Under cross examination, the UFU witnesses were unable to clarify why the UFU maintained its grievance, as set out below.

In respect of the UFU's concern about contracting out, Mr Ward said at Transcript PN8060 – Transcript PN8062:

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[243] Statement of Andrew O'Connell (**MFB-25**) at [34] and [39].
[244] Statement of Andrew O'Connell (**MFB-25**) at [26] – [31].
[245] Statement of Andrew O'Connell (**MFB-25**) at [37].
[246] Statement of Danny Ward (**UFU-19**) at DW-1.
[247] Statement of Danny Ward (**UFU-19**) at DW-1.

You may have, okay. The UFU notifies you of a grievance under the MFB operational staff agreement in relation to the proposed event. Then it says, 'The grievance relates to but is not limited to concerns regarding contracting out work, particularly training.' How, in any sense, is the MFB participating in a multi agency appliance display contracting out work?---I couldn't tell you, I didn't write that grievance.

You're conscious that your enterprise agreement, in effect, prohibits anyone else doing fire fighting work, it prohibits contracting out?---We have an agreement signed by both parties and if that's in the agreement, yes.

But you can't work out while you sit here how engaging in a multi agency drill could be contracting out?---Not at this moment I can't.

In respect of the UFU's concern about abrogating entitlements, Mr Ward said at Transcript PN8063 – 8069:

The next dot point he makes is, 'Abrogating entitlements (rostering meals, amenities payment and conditions for off duty personnel attending work.)' Right? Do you know on what Mr Lee could have based his view that the MFB did not intend meeting entitlements under the EB in respect of rostering meals, amenities, payments and conditions for off duty personnel, do you know that?

---Maybe because there's no consultation to agree, there's nothing in Mr O'Connell's statement to say they're going to provide meals, I don't believe.

There's nothing there but, indeed, I'm trying to work out where Mr Lee could have formed the view that the MFB were somehow going to engage in this exercise without paying entitlements or not providing rostering meals, amenities payment in accordance with the EB. You don't know?---With all due respect, you should ask Mr Lee that. I don't know why.

Well, I'm asking you because you put his statement - you put this in your statement. Right? And he also refers to - were you aware that Mr O'Connell has only ever intended on shift people to attend?---I'm not aware at all.

Were you aware that he was going to make sure that they got their entitlements?

---As I say, I'm not aware because it was never consulted on or spoken about.

And you never rang up Mr O'Connell and said, 'Are you going to make sure the - what's happening with the on duty, guys, are they getting their entitlements?' That would have been a five minute conversation, wouldn't it?---It may have been but I didn't ring him.

You didn't. And you could have said, 'What about the off duty guys, do they have to go?' Could have?---Mr O'Connell could have rung me too.

Well, he had advised your station, he advised all the firefighters involved and there's nothing in any of this material that suggests any of them had any concerns at all?--- Because the concerns were put to members of the union, the branch committee of management, Mr Lee, I believe, as a union industrial officer, and that's why the grievance was lodged, I believe.

In respect of the UFU's concern about a breach of crewing provisions, Mr Ward said at Transcript PN8070:

Also there's reference in this grievance, in that same paragraph I was referring to, breaches of crewing provisions. Do you know on what possible basis it's suggested

that the involvement of the MFB in this exercise was going to involve breaches of crewing provisions?---No.

The key concern of the UFU appeared to be that some appliances would be taken five kilometres outside of the metropolitan fire district. However, DCO Youssef had authorised the appliances to attend the event.[248] Mr Ward was cross examined about this issue and said at Transcript PN8091 – Transcript PN8092 in respect of the meeting between Mr Lee and ACFO David Bruce and DCO Youssef:

All right. Mr Lee is an industrial officer without any operational experience. It's rather unlikely that Mr Lee is going to be able to accept MFB assurances about UFU concerns, isn't it?---I don't agree.

You think Mr Lee is qualified to debate with ACFO Bruce and DCFO Youssef the appliance issue that you've just raised?---I do.

You think Mr Lee is qualified to have that debate with an ACFO and a DCFO?---I do.

At Transcript PN9607, Mr Lee said:

That issue about those concerns of a large number of appliances being taken outside the district and the provision of cover for the metropolitan fire district, those are assessments that are well outside your capability, experience or knowledge to make, aren't they?---Yes.

Further, at Transcript PN9616, Mr Lee said:

My proposition to you is you have in a dispute, part of which goes to, as you've told the commission, concerns regarding a large number of appliances being taken outside the metropolitan fire district, and I'm suggesting that when you meet with a DCFO, he is in a far, far better position than you to make an assessment of whether such concerns are founded or not, isn't he?---Yes.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU were able to use the dispute resolution procedure contained at clause 19 to invoke the status quo to prevent attendance by the MFB at the Knox multi-agency event.

6. Effect of the dispute

The effect of the dispute, and the UFU's ability to use the status quo provisions in the dispute resolution process, was that:

(a) the MFB was prevented from attending a multi-agency exercise which had been planned for six months;[249]

(b) MFB firefighters missed out on an opportunity to inspect appliances and equipment from other organisations and strengthen interoperability;[250] and

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[248] Statement of Andrew O'Connell (**MFB-25**) at [28].
[249] Statement of Andrew O'Connell (**MFB-25**) at [34].

(c) the MFB was unable to move its resources as it considered necessary and appropriate.

(d) Whether or not the status quo and grievance were to be withdrawn appeared to be in the hands of an industrial officer of the UFU who had no operational experience or qualifications (Mr Casey Lee). In the end, the UFU did not relent and the grievance remained in place for the duration of the display.[251]

The MFB position is that it is a bad outcome that the 2010 Agreement should give the UFU the ability to 'veto' an operational decision, or to use the status quo provision in the dispute resolution clause to prevent the MFB from carrying out an operational decision as determined by its most senior firefighters.

The dispute resolution procedure in the 2010 Agreement currently does that, and the UFU have used it to this effect.

This is an example of a very poor outcome for the MFB, firefighters, the CFA and the community.

[250] Statement of Andrew O'Connell (**MFB-25**) at [20].
[251] Statement of Andrew O'Connell (**MFB-25**) at [35].

Appendix G

Issues regarding Exercise Fudo

1. Outline of issue

Exercise Fudo is a large scale field deployment exercise designed to test operational readiness prior to the fire season.[252] Exercise Fudo has been running since 2005, but it was not called Exercise Fudo until 2010. It is now the largest operational deployment in the southern hemisphere for a multi-agency exercise.[253] The event was scheduled for and took place on 27 November 2011.[254]

On 29 April 2011, Commander O'Connell briefed the Command Forum on Exercise Fudo.[255] Throughout September, Commander O'Connell circulated promotional flyers for the event.[256] On 2 September 2011, Commander O'Connell emailed senior operational staff to brief them on the MFB's involvement in Exercise Fudo.[257]

In late October and early November 2011, Commander O'Connell liaised with Ken Brown, Mark Lyons and Brendan Angwin (who are all UFU BCOM members) regarding arrangements for the event.[258]

The UFU subsequently contacted Commander O'Connell with concerns about Exercise Fudo, although these concerns were not specifically articulated.[259]

On 13 November 2011, Commander O'Connell emailed the UFU to confirm that lunch would be provided and the attending crews would be paid for any overtime in accordance with the 2010 Agreement. He also advised that the exercise was in its sixth year, and the 2011 exercise was almost identical to the exercise carried out in 2010.[260]

Commander O'Connell also personally visited each attending crew to brief them on their involvement.[261]

The UFU lodged a dispute 6 days prior to the event.[262]

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[252] Statement of Andrew O'Connell (**MFB-25**) at [55].
[253] Statement of Andrew O'Connell (**MFB-25**) at [56].
[254] Statement of Andrew O'Connell (**MFB-25**) at AO-15 – page 125.
[255] Statement of Andrew O'Connell (**MFB-25**) at [63].
[256] Statement of Andrew O'Connell (**MFB-25**) at [64].
[257] Statement of Andrew O'Connell (**MFB-25**) at [65].
[258] Statement of Andrew O'Connell (**MFB-25**) at [66] – [67].
[259] Statement of Andrew O'Connell (**MFB-25**) at [68].
[260] Statement of Andrew O'Connell (**MFB-25**) at [69].
[261] Statement of Andrew O'Connell (**MFB-25**) at [70].
[262] Statement of Danny Ward (**UFU-19**) at [68].

Commander O'Connell and Paul Stacchino then met with the UFU on 23 November 2011 in response to the UFU's request for an urgent meeting regarding the lack of consultation associated with the exercise.[263]

The UFU requested that as part of the exercise, appliances were not be sent to volunteer fire stations in Mount Eliza and Narre Warren as part of the drill. Although an operational decision, the MFB chose on that occasion to accommodate the request in order to ensure the exercise went ahead.[264]

No grievance was ultimately lodged under the 2010 Agreement and the UFU allowed the exercise to proceed.[265]

2. Relevant provisions of the 2010 Agreement

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

Clause 19 – Dispute Resolution

> *'19.4. While the above [dispute resolution] procedures are being followed, including the* ***resolution*** *of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [55] – [74];
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [66] and [69]; and
- Transcript including at Transcript PN3262 – Transcript PN3275.

The MFB's position at the time was that consultation with the UFU was not required before multi-agency events. Consultation with the union prior to multi-agency events was not the usual practice and had not been done in the past.[266] The event had run for the previous six years without any problems, and indeed was hailed as a success.[267]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

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[263] Statement of Andrew O'Connell (**MFB-25**) at [71].
[264] Statement of Andrew O'Connell (**MFB-25**) at [72].
[265] Statement of Andrew O'Connell (**MFB-25**) at [73].
[266] Statement of Andrew O'Connell (**MFB-25**) at [17].
[267] Statement of Andrew O'Connell (**MFB-25**) at [55], [59] and [69].

- the witness statement of Danny Ward (UFU-19) at [67] – [70]; and
- Transcript including at Transcript PN8218 – Transcript PN8250.

The UFU's position appears to be that the MFB had not consulted with the UFU in respect of the event, and that it was '*incumbent upon the UFU to enforce and protect entitlements enshrined in enterprise agreement* (sic) *covering MFB employees.*'[268]

It was irrelevant to the UFU that, despite the fact that the UFU was aware of the exercise well in advance, it did not raise a grievance until a few days before the event. Mr Ward said in cross examination at Transcript PN8239 – Transcript PN8250:

> *What possible reason could it have taken the union so long to come up and allege a lack of consultation, some three or four days before this event was to take place?---I believe just to make sure everything was correct in what they were doing. I notice that the exercise continued and was well received.*
>
> *But what possible reason could they have to sit on the sort of material they had been provided, then raise it to some four days before, and allege lack of consultation?---I mean - - -*
>
> *Do you have any idea at all why?---Well, to me it's irrelevant. The parties met and discussed and sorted out any issues, and the drill continued. The exercise continued and went ahead.*
>
> *Yes, but - - -?---After everything was - - -*
>
> *But this is in a context where in 2011, twice the UFU had raised grievances about these exercises very soon before the exercises were to take place, invoked the status quo, and effectively interfered with or prevented the involvement of the MFB in the exercise, didn't it?---The status quo, I'm not quite sure of. The parties meet when a dispute has been raised and they try and sort it out, and they sorted this one out and it went ahead.*
>
> *It sorted out because absent it being - absent the MFB agreeing to whatever demands the UFU made, the UFU, in all likelihood, would have lodged a grievance and invoked the status quo, wouldn't I?---The drill went ahead. I don't see what the problem is. The drill went ahead after discussion and consultation.*
>
> *But, you see, the MFB took the position originally that, number one, they didn't need to consult about the drill that had been going for five or six years. That's understandable, isn't it?---Because it had been going for so long did not mean that things weren't done properly previous. When issues are raised with the union, we try and act on them and get things done to the best of the MFB and firefighters.*
>
> *So firstly - but that's not an unreasonable position of the MFB to take, is it, to assume that one doesn't need to consult about something that has been going on for six or so years?---I never assume anything. I try and just make sure everything is right. Whenever I give advice I try and make sure everything is right, and what I tell them is right, so I never assume.*
>
> *And secondly, when asked some two weeks before, MFB had given all the information the UFU had requested, didn't they?---Then the UFU sat down and must have went*

[268] Statement of Danny Ward (**UFU-19**) at [67[.

through it, Mr Lee and Mr Hamilton, and then come to the opinion there was problems, and raised them.

You say 'must have', you weren't involved in these deliberations, were you?

---Well, I think Mr Lee and Mr Hamilton were.

All right. Do you accept that all that the MFB was, on 23 November, in a very difficult position with regard to the UFU? Absent agreement to the UFU demands, then in all likelihood the UFU was going to lodge grievance and invoke the status quo. Do you accept that?---I cannot say what the MFB thought at the time. I just know they met and the issues were resolved.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU were able to use the dispute resolution procedure contained at clause 19 to invoke the status quo as a means of pressuring the MFB to agree to the UFU's demands, in circumstances where the exercise had been carried out for the previous six years without any requirement to consult with and have the approval of the UFU for it to proceed.

6. Effect of the dispute

In order to secure the agreement of the UFU and enable the event to proceed, the MFB was compelled to make changes to the event that it otherwise would not have made.[269]

That such a successful multi-agency exercise that had run for the previous six years had become subject to both consultation and UFU approval (veto) exemplifies the breadth of the current 2010 Agreement requirement for consensus on any decision – including operational decisions.

It is a bad outcome that the MFB is unable to continue to run multi agency exercises unless the UFU agree. This is particularly concerning given the new interoperability regime mandated under the *Emergency Management Act 2013*.

[269] Statement of Andrew O'Connell (**MFB-25**) at [74].

Appendix H

Deployment of the Telesquirt at the Hazelwood mine fire

1. Outline of issue

The Hazelwood mine fires in Morwell started on 9 February 2014 and burned for approximately 50 days.[270] The fires were managed under the Fire Services Reform Action Plan incorporated into the *Fire Services Commissioner Act 2010*, with the Fire Services Commissioner having overall control for the incident.[271]

Within the first week of the fires, the CFA requested that the MFB provide as many aerial appliances as possible. The MFB provided one appliance, but the CFA asked for more.[272]

Since 2012[273] the MFB has had a Telesquirt (or Bronto) aerial appliance, which has not been commissioned due to an absence of agreement between the parties.[274] The MFB negotiated with the UFU to agree to commission the appliance for use at Hazelwood. Firefighters from South Australia had to be flown in to operate the appliance because MFB firefighters had not been trained in its use.[275]

2. Relevant provisions of the 2010 Agreement

***Clause 88 – Uniforms and Equipment*, in particular:**

> *'88.1 The MFESB and UFU must agree on all aspects of the:*
>
> *...88.1.4 appliances; to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'*

***Clause 13 – Consultative Process*, in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of David Bruce (**MFB-22**) at [27] – [30];
- the witness statement of Darren McQuade (**MFB-27**) at [74] – [76] and [81];
- the reply statement of Darren McQuade (MFB-28) at [54] and [60]; and
- the reply statement of Peter Rau (MFB-8) at [98].

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[270] Statement of Peter Rau (**MFB-7**) at [49]
[271] Section 10 of the *Fire Services Commissioner Act 2010*, which was in force at the time of the Hazelwood fires
[272] Statement of David Bruce (**MFB-22**) at [27]-[28]
[273] Statement of Darren McQuade (**MFB-27**) at [62]
[274] For example, statement of David Bruce (**MFB-22**) at [28] and statement of Darren McQuade (**MFB-27**) at [74]
[275] Statement of David Bruce (**MFB-22**) at [29] and statement of Darren McQuade (**MFB-27**) at [74] – [75]

Due to the requirement to reach agreement with the UFU on 'all aspects' of appliances, the MFB's new Telesquirt appliance had been sitting idle since 2012,[276] because no agreement had been reached between the parties on its deployment. Accordingly, the MFB had not trained any of its firefighters in the use of the Telesquirt, because the appliance was not close to being approved for commission by the UFU.[277]

The MFB wanted to use the appliance at Hazelwood but, as it did not have any firefighters trained on the appliance due to the length of time it was taking to consult on deployment of the appliance, the MFB had to negotiate '*an outcome with the UFU where we had firefighters from South Australia attending Hazelwood to operate the Telesquirt on our behalf.*'[278]

The Telesquirt was considered one of the most productive appliances used at Hazelwood.[279]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Michael Psailia (**UFU-21**) at [111]-[112] and [116]; and
- Transcript PN7051-Transcript PN7070 (Mr Tisbury) and Transcript PN8006 - Transcript PN80008 (Mr Ward).

The UFU position with respect to having to fly in South Australian firefighters to operate the appliance was summarised by Michael Tisbury for the UFU when cross-examination by Mr Whelahan:

> *So at 78 you set out here the problem. 'To use this appliance the problem was that no-one had been trained due to the absence of agreement in EBIC to commission the Telesquirt.' So that's the problem. Correct?---Yes.*
>
> *There are two parts to that problem, one of which is the absence of agreement between the UFU and the MFB to commission the appliance?---Because the appliance wasn't ready to be commissioned. So you couldn't agree to commission it because it wasn't ready. There was nowhere to store your hoses. There was no training package developed for it.*
>
> *The South Australian firefighters operate that appliance?---Yes.*
>
> *At 79 - - -?---That was on the suggestion of the United Firefighters Union too, I might add.*
>
> *So you're quite content for South Australian firefighters to operate the appliance. Correct?---Because they had been trained.*
>
> *But not the MFB employees?---Because they hadn't been trained and they had no training package developed.*
>
> *That's right. Despite South Australia using that appliance, if the UFU don't like it and don't agree to it ever being commissioned, it will never become operational within the MFB. Correct?---Correct.*[280]

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[276] Statement of Darren McQuade (**MFB-27**) at [62]
[277] Statement of Darren McQuade (**MFB-27**) at [75]
[278] Statement of David Bruce (**MFB-22**) at [29]; reply statement of Peter Rau (**MFB-8**) at [98]
[279] Statement of Darren McQuade (**MFB-27**) at [81]

The UFU agreed that it was an important appliance used at Hazelwood.[281]

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the requirements to reach agreement with the UFU on all matters regarding appliances meant that the MFB had not been able to deploy and train its firefighters to use an appliance which ultimately played an important role in fighting the fire at Hazlewood.

6. Effect of the dispute

The effect of the 2010 Agreement was that the requirement to consult and reach agreement with the UFU on all aspects of appliances including deployment, fettered the discretion of the MFB to manage its resources.[282]

Because of the inability to reach agreement with the UFU on deployment of the appliance, its own firefighters had not yet been trained on the operation of the appliance. The MFB had to therefore fly in firefighers from another State to operate the appliance, without which it would not have been used at Hazelwood.[283]

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[280] Tisbury at PN7064-PN7070
[281] Tisbury at PN7060
[282] Reply statement of Peter Rau (**MFB-8**) at [95] and [98]
[283] Statement of Darren McQuade (**MFB-27**) at [75]

Appendix I

Bin fires

1. Outline of issue

In or around late 2006 the MFB began consultation with the UFU to amend the MFB response to bin fires in the CBD from responding with two appliances to responding with one appliance.[284]

This was based on data collected by Commander Darren McQuade (then Senior Station Officer at Eastern Hill) which demonstrated that the numbers of bin fires had increased 528% between 2001 and 2007, and that responding with two appliances was putting both firefighters and the public at unnecessary risk.[285]

The proposal proceeded through consultation from 2006 to November 2012, with the MFB seeking to gain the approval of the UFU to the proposal.[286] Agreement from the UFU has never been obtained, and the MFB continues to be the only fire service in Australia to send two appliances to every bin fire.[287]

Relevant provisions of the 2010 Agreement

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 36: Crewing Appliances and Stations,* in particular:**

> *'36.7. The MFESB will meet its duty of care by ensuring seven professional career firefighters to fireground incidents before commencement of safe firefighting operations.'*

2. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Darren McQuade (**MFB-27**) at [143] – [175];
- the reply statement of Darren McQuade (**MFB-28**) at [14] – [25] and [30] – [31];
- Transcript, at Transcript PN457-Transcript PN465 and Transcript PN659-660 (Mr Rau), and Transcript PN3362-Transcript PN3378, Transcript PN3380-Transcript PN3381 and Transcript PN3539-Transcript PN3574 (Mr McQuade).

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[284] Statement of Darren McQuade (**MFB-27**) at [145] – [146]
[285] Statement of Darren McQuade (**MFB-27**) at [144], [148], and at **DM-23**
[286] Statement of Darren McQuade (**MFB-27**) at [146] – [171] and
[287] Statement of Darren McQuade (**MFB-27**) at [170] – [171] and [175], and for example McQuade at PN3367

The MFB position is that bin fires can easily be controlled with one appliance,[288] and that responding with two appliances under emergency response conditions causes:[289]

- increased unnecessary risk to responding firefighters; and
- increased risk to the public.

The MFB position is supported by the fact that every other fire service in Australia (and the fire service in London, UK) sends one appliance to bin fires and that the proposal had the 'overwhelming support' of the responding stations, with 105 out of 110 firefighters working in the CBD supporting the proposal.[290] Furthermore, out of those five firefighters who did not show support for the proposal, two of the five subsequently stated that they were concerned that there would be 'exposures' (that is where for example it is reported that there is a car or a building next to the bin fire which could increase its risk), when in fact the proposal put to them stated clearly that the one appliance response would not apply where exposures were reported.[291]

The MFB proposal on bin fires is also supported by Assistant Chief Fire Officer Walker, witness for the UFU.[292]

The MFB evidence regarding escalating a response to a bin fire if, upon arrival, it transpires that for some reason more appliances are required to deal with the fire, is that the MFB can at any time request and send more appliances.[293] This was supported by UFU witness David Hamilton who, under examination in chief, stated at Transcript PN7354:

> *What does that mean [that the information from the public regarding an incident such as a bin fire can vary] in terms of the firefighters' response, in our experience, when you get to the incident?---Certainly I've been trained in the greater alarm response that the MFB use to attend fires. We use the greater alarm response. When we reach the fire and/or incident the appropriate wordback is given and appropriate resources deal with the fire. If it's a small bin fire my dynamic risk assessment or the assessment of the situation and wordback will either escalate or de-escalate the fire, as per the greater alarm.*
>
> *The MFB position is that consultation on this proposal has been extensive, that the UFU gave in principle support to the proposal, asked for various procedural steps in the consultation process to be taken by the MFB, which the MFB complied with, but still after almost 6 years of consultation the UFU simply rejected the proposal.*[294]

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[288] Statement of Darren McQuade (**MFB-27**) at [144], McQuade at PN3366, Rau at PN457 and PN660

[289] Statement of Darren McQuade (**MFB-27**) at [144] and at Annexure **DM-23**; reply statement of Darren McQuade **(MFB-28)** at [14]; Rau at PN660

[290] Statement of Darren McQuade (**MFB-27**) at [151] and [172] – [173]; reply statement of Darren McQuade (**MFB-28**) at [14]; and McQuade at PN3367-PN3368

[291] McQuade at PN3368 and PN3381; reply statement of Darren McQuade (**UFU-28**) at [16]; See also annexure **DM-23** to statement of Darren McQuade (**MFB-27**)

[292] Walker at PN5180-PN5196

[293] Reply statement of Darren McQuade (**UFU-28**) at [31]; Rau at PN660

[294] Reply statement of Darren McQuade (**UFU-28**) at [145] – 172] and at [173]; Walker for the UFU at PN5177

Under cross examination Mr McQuade was asked why the MFB had not included the proposal regarding bin fires in their 2010 log of claims.[295] Mr McQuade's response was as follows:

> *... What I can tell you is that I was given commitments by the UFU that it would be supported, and never once have they come to the party in supporting it. So, they have taken me down a path for six years telling me, referring it from the branch committee of management meeting, to an EBIC meeting, which was a predecessor of the consultative committee, to a general meeting, to a meeting of the national committee of management, all along giving me an undertaking that they are supportive of it, and you are asking me why I haven't followed it through with the brigade?*[296]

The evidence of Mr McQuade further dealt with the many years he had spent trying to obtain UFU agreement to respond with one appliance to CBD bin fires, at Transcript PN3557 – Transcript PN3560:

Well, on your evidence it is irrelevant to that issue?---I think the point of that, the point of the irrelevance is that we don't need two fire trucks and seven firefighters to a rubbish bin fire.

If it's irrelevant, then you would agree with me that the dispute resolution procedure offers a way for the MFB to progress that proposal?---And like is said earlier, after five years and no reason for rejecting it, on what basis would I pursue it?

On the basis that you think it's a good idea and ought to be pursued?---So, how many years do you do this for?

I don't know, Mr McQuade. What I am suggesting to you is there is a process in the agreement that enables the MFB to pursue the idea that you think has merit. Would you agree with that?--- Yes, there's a process, but I've been trying to do it for five years, six years.

The MFB position is that consultation has been exhausted on this issue, and that the fact that UFU agreement has still not been reached, despite the consultation undertaken and the overwhelming support from firefighters, is 'immensely disappointing'.[297]

3. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of David Hamilton (**UFU-16**) at [96] – [109];
- the witness statement of Andrew Wood (**UFU-45**) at [4] – [6]; and
- Transcript, at Transcript PN5174-Transcript PN5196 (Mr Walker), Transcript PN6857-Transcript PN6877 (Mr Tisbury) and Transcript PN7352-Transcript PN7354 and Transcript PN7595-Transcript PN7617 (Mr Hamilton).

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[295] McQuade at PN3545
[296] McQuade at PN3548
[297] Statement of Darren McQuade (**MFB-27**) at [172] and [173]

The UFU opposes the MFB proposal to amend its response to bin fires to responding with only one appliance.[298]

However, the UFU position is inconsistent on the matter, with Assistant Chief Fire Office Michael Walker for the UFU stating under cross examination his support for the proposal. That is, Mr Walker supported the proposal shortly after it was raised by Mr McQuade in 2007, and continues to support the proposal today.[299]

Nevertheless, the position put forward by the UFU in written evidence is that incidents can be 'unpredictable' and that upon arriving at the scene of a reported bin fire, firefighters may not have all information regarding the incident, for example the source, nature or extent of the fire, and that this is why the MFB is required to respond with two appliances.[300] The MFB response to this is that more appliances can be requested if needed.[301] This position was also confirmed by UFU witness Mr Hamilton, who stated that upon reaching a bin fire, GARS can be used to scale up or scale down the response.[302]

The MFB evidence is further that the reason for the UFU's rejection of the proposal is that it would breach the '7 on the fireground' rule.[303] The MFB evidence is that this issue has never previously been put forward as a reason for rejection and is irrelevant for bin fires.[304]

4. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the consultation requirements and the ability of the UFU to veto a proposal through withholding its agreement has resulted in six years of consultation and an inability to implement the proposal.

5. Effect of the issue

The effect of the issue is that the MFB is not able to manage its own resources and implement the safest (both for firefighters and the community) and most appropriate operational response to bin fires.

As stated by Mr McQuade in his statement (MFB-27) at [173]:

> *It is another example of where the MFB wishes to implement an operation change, this time in the way it responds to a specified event, but the decision ultimately lies in the hands of the UFU, not MFB management.*

In order to carry out its statutory responsibilities, the MFB ought to be able to make this kind of operational management decision without it being subject to the veto of the UFU.[305] Under the

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[298] For example, statement of Darren McQuade (**MFB-27**) at [170]; Tisbury at PN6870, Hamilton at PN7617; Walker at PN5177-PN5179

[299] Walker at PN5180-PN5196

[300] Statement of David Hamilton (**UFU-16**) at [96] and [97] and statement of Andrew Wood (**UFU-45**) at [5]

[301] Reply statement of Darren McQuade (**UFU-28**) at [31]; Rau at PN660

[302] Hamilton at PN7354

[303] For example, statement of David Hamilton (**UFU-16**) at [108] and [109]

[304] Reply statement of Darren McQuade (**UFU-28**) at [24]

current 2010 Agreement the MFB cannot introduce one appliance to CBD bin fires unless the UFU agree. The MFB continues to be the only fire service in Australia which sends two appliances to a bin fire response.[306] This is another example of a poor outcome for the MFB, firefighters and the community arising from the operation of the 2010 Agreement, and its curtailment of the MFB's ability to deploy its resources efficiently.

[305] Statement of Darren McQuade (**MFB-27**) at [174]

[306] Statement of Darren McQuade (**MFB-27**) at [170] – [171] and [175], and for example McQuade at PN3367

Appendix J

Issue regarding Greener Government Buildings

1. Outline of issue

In early 2014, the MFB sought to implement the Victorian Government's 'Greener Government Buildings' program, aimed at assisting departments and agencies to reduce energy use, water use and greenhouse gas emissions. The program involves the Victorian Government offering a cost neutral loan to organisations to fund assessments on environmental impact.[307]

In January 2014 the MFB presented a proposal to the Consultative Committee. For each proposed change, the MFB's proposal set out the current situation, the proposed measure, the change and the impact on work amenity.[308] For example, putting reflective film on windows to reduce the amount of heat that enters a building and assessing the efficiency of cooling systems.[309]

To date, the UFU has refused to endorse the proposal, relying on the absence of cost savings data, despite the fact that the MFB has explained to the UFU that this is an environmental initiative and that it is not clear that there would be any quantifiable savings for the MFB and if there were indeed any savings, they were not relevant to productivity.[310]

2. Relevant provisions of the 2010 Agreement

Clause 15 – Introduction of Change

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 still apply.'*

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 19 – Dispute Resolution,* in particular:**

> *'19.4. While the above* [dispute resolution] *procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

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[307] Statement of Janette Pearce (**MFB-29**) at [25] – [30]
[308] Statement of Janette Pearce (**MFB-29**) at [31]
[309] Statement of Janette Pearce (**MFB-29**) at [27] – [30]
[310] Statement of Janette Pearce (**MFB-29**) at [24] and [32] – [35]

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Janette Pearce (**MFB-29**) at [24] - [35];
- the reply statement of Janette Pearce (**MFB-30**) at [20] – [23]; and
- Transcript PN3654 – Transcript PN3673 (Ms Pearce).

The MFB position is that the Greener Government Buildings program is an environmental program aimed at reducing environmental impact and despite receiving 'in principle' support to the program from the UFU early this year, the MFB is yet to implement its proposal to take part in the program as the UFU has not endorsed the project. The MFB's position is that this is due to the UFU unnecessarily withholding its endorsement of the MFB's proposal until the MFB provide information about the anticipated cost savings to the MFB.[311]

The MFB's position, which was communicated to the UFU in the consultative committee meeting in January 2014, is that the MFB does not see that there will be any productivity savings realised from any particular initiative and that the project was simply an environmental initiative aimed at reducing water and electricity use rather than reducing cost.[312]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Dimitra Eirini Sophia Krouskos (**UFU-25**) at [89] – [96]; and
- Transcript PN9992 – Transcript PN10003 (Ms Krouskos).

The UFU agrees that the MFB has been unable to implement the programme because the UFU has not agreed to it:

> *committee?---Correct.*[313]The UFU's position is that the MFB's participation in the program is somehow tied to productivity and, on that basis, should be listed as a future agenda item in the consultative committee.[314] In particular, under cross-examination, Ms Krouskos stated (in reference to the quantum of cost savings to the MFB arising from the project):
>
> *What possible effect on the UFU could the quantum of cost savings to the MFB from this project have?---As I said, it's one of the things that we consider when we consider to endorse a proposal or not. It's not uncommon for us to ask that question if there is going to be significant cost savings. I think, as I said, with the internet question, if there is going to be significant costs savings, then the MFB is going to have more money to perhaps spend on something else, that's something we'll take into account. If there's going to be no cost savings whatsoever, then it may become an irrelevant issue.*[315]

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[311] Statement of Janette Pearce (**MFB-29**) at [32] – [35]
[312] Statement of Janette Pearce (**MFB-29**) at [32]; Pearce at PN3659
[313] Krouskos at PN9996
[314] Statement of Rini Krouskos (**UFU-25**) at [95]
[315] Krouskos at PN10002

However, it is evident from the above that the MFB's participation in the program would be cost neutral, as the MFB would be required to repay the loan from the Victorian Government over the life of the investment.

The UFU has also raised alleged concerns about proposed works to be undertaken and taken the position that the MFB should either provide a full schedule of planned works or have an ongoing procedure for report backs via the consultative committee. Ms Pearce confirmed under cross-examination that the MFB doesn't have a problem in providing the project schedule, once it has been developed.[316]

The only reason the MFB has not provided a project schedule is because the MFB has not engaged a contractor in relation to the project of works. The reason the MFB has not engaged a contractor is because it sees little point doing so without the agreement of the UFU; this would just result in a risk of the UFU raising a grievance under the dispute resolution procedure and the costs of the contractor being wasted if the status quo was invoked on any such work programs.[317]

5. Operation of the 2010 Agreement

The 2010 Agreement operates to require the MFB to consult with the UFU, and reach agreement on, any proposal which constitutes 'change in matters pertaining to the employment relationship'.[318] The dispute resolution process at clause 19 permits the UFU to initiate a grievance and prevent that change from happening if it considers that consultation has not occurred or that insufficient consultation has occurred, regardless of the reason for the grievance.

6. Effect of the issue

The effect of clauses 13, 15 and 19 of the 2010 Agreement in this case meant that the MFB has been required to seek the UFU's agreement to participate in a simple, straightforward Victorian government environmental program that has nothing to do with workplace change. Due to the requirement to obtain UFU agreement within the consultative process, the MFB has not been able to participate in that program to date.

The MFB position is that the requirement to consult and reach agreement with the UFU on all matters pertaining to the employment relationship in the broad manner that is currently required under the 2010 Agreement, stifles any change it may determine is appropriate.

The MFB is of the view that in order to operate efficiently, the UFU ought not be entitled to determine whether or not the MFB participates in a Victorian government initiative which has, to date, enabled a range of other government departments and agencies to undertake projects

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[316] Pearce at PN3673
[317] Reply statement of Janette Pearce (**MFB-30**) at [21]
[318] Clause 15 of the 2010 Agreement

aimed at reducing environmental impact. This example is another bad outcome for the MFB, firefighters and the community.

Appendix K

Issue regarding Teleboom Replacement Project

1. Outline of issue

In 2009, the MFB wanted to undertake a replacement of its fleet of Teleboom appliances because they were nearing their preferred life-span and, as they had proved operationally advantageous, needed to be replaced with an appliance with similar capabilities.[319]

Following a trip to New Zealand to inspect the proposed new model, a 'Combination Boom' appliance (**Bronto**), a level of consensus was reached with the UFU and a new Bronto was ordered on 8 March 2011 (although the UFU denies reaching consensus).[320] The UFU then raised a grievance on 30 May 2011 on the basis that the MFB had not consulted in relation to the Teleboom replacement as required under clause 88 of the 2010 Agreement and status quo was invoked by the UFU, stating that '*the proposed appliances must not be implemented*'.[321]

Since early 2011, numerous attempts have been made to resolve the issue including preparing a Teleboom Replacement Discussion Paper addressing a range of issues and, in November 2012, conducting a practical side-by-side comparison of the Teleboom with the proposed Bronto. Nevertheless, the new Bronto continues to remain idle as the UFU refuses to agree to its commissioning.[322] This is despite the Bronto being commissioned and used at the Hazelwood mine fires.

2. Relevant provisions of the 2010 Agreement

***Clause 88 – Uniforms and Equipment,* in particular:**

> *'88.1. The MFESB and UFU must agree on all aspects of the:*
>
> *...*
>
> *88.1.4. appliances;*
>
> *to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'*

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 19 – Dispute Resolution,* in particular:**

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319 Statement of Darren McQuade (MFB-27) at [39] and [41]; statement of Robert Psaila (UFU-21) at [100]; Reply Statement of Darren McQuade (MFB-28) at [48]
320 Statement of Darren McQuade (MFB-27) at [42] – [50]; and statement of Robert Psaila (UFU-21) at [100]
321 Statement of Darren McQuade (MFB-27) at [51] – [54]
322 Statement of Darren McQuade (MFB-27) at [55] – [79]

'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Darren McQuade (**MFB-27**) at [39] – [88];
- the reply witness statement of Darren McQuade (**MFB-28**) at [33] – [35, and [48] – [60];
- Transcript PN3377 – Transcript PN3378, Transcript PN3458 – Transcript PN3507 and Transcript PN3592 – Transcript PN3615 (Mr McQuade).

The MFB's position was initially that consultation was not required under the 2010 Agreement as the Bronto proposal was initiated under the 2005 enterprise agreement, and consultation had occurred.[323] However, on 5 March 2012, the Chief Officer at the time, Shane Wright, wrote a letter to the UFU in which he stated:

> *...it is clear that although these projects commenced in 2009, we should endeavour to reach agreement with the UFU...in accordance with clause 88 of the current EA. To facilitate this, I suggest the projects be listed for consultation at the next operational Consultation Committee. This is on the understanding that the proposals be dealt with in good faith from start [sic] of the respective projects and regardless of any contractual arrangements and/or actions that have already occurred to date.*

Initially, the reasons for the UFU withholding approval appear to be in relation to observations made while in New Zealand concerning the chassis. However, the evidence of the MFB is that these issues raised by the UFU in 2011 were addressed and then later, in 2012, the UFU's concerns changed.

In particular, Mr McQuade's evidence at [69] – [70], was as follows:

> *Observing the UFU representative, Rob Psaila, at the comparison display, it seemed that his concerns were unrelated to the initial issues as outlined in the Teleboom replacement Discussion Paper, which included the chassis issue on the New Zealand appliance.*
>
> *[Mr Psaila's] main concerns were about the height of the appliance when jacked up, the length of the appliance, the lack of stowage space for hose and firefighter access/egress of the boom. Apart from the height issue, which was a result of how the operator used the appliance, the Bronto actually has approximately 2.8 cubic metres more stowage space than the MFB's current Telebooms, and I don't believe the access to the boom on the Bronto is any more difficult than on the Teleboom.*
>
> *These issues are not therefore, in my opinion, real concerns. It appeared to me that the UFU were determined to reject the Bronto for reasons unknown to me.*

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[323] Statement of Darren McQuade (**MFB-27**) at [53]

As Mr McQuade points out in his reply statement, paragraph [30] of Mr Psaila's statement is the first time the UFU have listed their concerns in writing.[324]

During the recent Hazelwood fire the MFB's Bronto was operated by South Australian firefighters (as MFB fire fighters were not trained in how to operate the Bronto). The evidence of Mr McQuade is that feedback from those firefighters is they thought it was a great piece of equipment.[325] Further, feedback received by the MFB from the Bronto representative is that the experience of other Australian and New Zealand fires services with the Bronto has been very positive.[326]

Ultimately, as Mr McQuade states at [55] and [58] of his reply statement:

> *The MFB should be able to take into account views from all affected parties and make decisions about the appliance as it sees fit. This cannot happen at the moment.*
>
> ...
>
> *When there is disagreement between the MFB and the UFU representatives, there is often no way forward. Here, the MFB believes that the new appliance is superior but the UFU disagrees. Because of this the MFB either has to go through a lengthy process to satisfy the UFU issues, substantive or not, in order to get agreement, or it abandons the project.*

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Robert Psaila (**UFU-21**) at [26] – [31] and [100] – [116]; and
- Transcript PN8594 – Transcript PN8600 (Mr Psaila), Transcript PN8001 – Transcript PN8005 (Mr Ward).

The UFU's position is that there are allegedly a range of deficiencies with the Bronto appliance. For the first time the UFU has in these proceedings provided the MFB with a list of 15 issues with the Bronto (referred to in the statement of Mr Psaila as the telesquirt).[327] Prior to this, the nature of the issues communicated to the MFB included:

- the chassis (as observed in New Zealand and addressed in the Teleboom Replacement Discussion Paper)[328]; and
- following the side by side comparison, four issues communicated orally by Mr Psaila including the height of the vehicle, the length of the vehicle, apparent lack of stowage space and access to the boom.[329]

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[324] Reply Statement of Darren McQuade (**MFB-28**) at [35]
[325] Statement of Darren McQuade (**MFB-27**) at [76]
[326] Statement of Darren McQuade (**MFB-27**) at [82] – [83]
[327] Statement of Robert Psaila (**UFU-21**) at [30]
[328] statement of Darren McQuade (**MFB-27**) at [46] – [48]
[329] Statement of Darren McQuade (**MFB-27**) at [70]

Ms Psaila suggested under cross-examination that the other items listed in paragraph 30 of his statement were given to the MFB at the time. However, under cross-examination, it was put to Mr Psaila that Mr Quade had asked him over the phone a couple of days after the comparison for the list and Mr Psaila could not recall the phone call.[330]

Overall, the UFU's position is that:

> *...No further meeting was convened by the MFB regarding the permanent commissioning of this appliance, nor did they seek to progress the matter through consultation, until 20 May 2014. I was in attendance at that meeting where it was discussed what equipment would be required to be stored on the appliance including the hose required. I note that UFU has not agreed to the permanent commissioning of the teleboom because the MFB has not addressed any concerns nor sought to progress the matter whatsoever.*

5. Operation of the 2010 Agreement

The operation of clause 88 of the 2010 Agreement in this example meant that the MFB has been unable to commission an appliance without agreement of the UFU. Specifically, an appliance which is in operation in a number of agencies in Australia and New Zealand with positive reports.[331]

6. Effect of the dispute

The effect of the grievance concerning clause 88 of the 2010 Agreement was that the requirement to consult and reach agreement with the UFU on all aspects of appliances including deployment has fettered the discretion of the MFB to manage its resources.

Despite engaging in consultation under the 2005 Agreement and reaching consensus on the purchase of an appliance, because of the UFU's refusal to agree to the commissioning of the Bronto appliance, and the extensive delays already caused, the MFB has a valuable appliance sitting idle and has been forced to put plans to replace other existing Telebooms on hold. This means that the appliances which otherwise would have been replaced remain in service beyond their preferred 15-year lifespan.[332]

On any reasonable view, this issue is illustrative of the bad outcomes arising from the veto power given to the UFU by the 2010 Agreement.

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330 Psaila at PN8599

331 Statement of Darren McQuade (**MFB-27**) at [82]

332 Statement of Darren McQuade (**MFB-27**) at [55] – [79]

Appendix L

Dispute regarding loan of BA Pod to CFA

1. Outline of dispute

In July 2011 Deputy Chief Officer David Youssef and Assistant Chief Fire Officer Darren Davies considered and agreed to a CFA request for the MFB to loan to the CFA their BA Pod.[333]

The UFU raised a grievance the next day which stated among other things that the MFB had not followed the consultative processes contained in the 2010 Agreement or followed 'other entitlements'.[334] The grievance invoked the status quo, with the UFU stating that this meant that the loan was not to occur until the grievance was resolved.[335]

The loan did not take place.

2. Relevant provisions of the 2010 Agreement

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

Clause 19 – Dispute Resolution, in particular:

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Darren Davies (**MFB-31**) at [68] – [91];
- the reply witness statement of Darren Davies (**MFB-32**) at [6] – [12] and [20] – [24]; and
- Transcript, including at Transcript PN3843-Transcript PN3538 (Mr Davies).

The MFB position is that the loan of the BA Pod was a simple solution to a problem that the CFA had, and in relation to which it had requested the assistance of the MFB.[336] The MFB's position is further that the decision to loan the BA Pod was an operational decision upon which no consultation should be required, and which should not be capable of being the subject of a

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[333] Statement of Davies (**MFB-31**) at [72] and [73], reply statement of Davies (**MFB-32**) at [8] and [9], and Davies at PN3857
[334] Statement of Davies (**MFB-31**) at [77]
[335] Statement of Davies (**MFB-31**) at [78]
[336] Statement of Davies (**MFB-31**) at [72] and [73], and Davies at PN3857

grievance where the status quo could be invoked so as to prevent the MFB from carrying out that decision.[337]

As set out at paragraph 12 of Mr Davies' reply witness statement in relation to this issue:

> *I do not believe that the UFU should have the ability to undermine the powers of the Chief Officer or the Fire Services Commissioner by taking control of operational resources. The community cannot have confidence in a system that allows an external third party body to control emergency services resources.*

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Michael Tisbury (**UFU-14**) at [96] – [100];
- the witness statement of Danny Ward (**UFU-19**) at [77] – [84];
- Transcript, including at Transcript PN7089 – Transcript PN7140 (Mr Tisbury) and Transcript PN8251 – Transcript PN8324 (Mr Ward).

The UFU position was that the MFB should have consulted on the decision to loan the BA Pod to the CFA, and that the UFU should be able to raise a grievance in relation to such a matter.[338]

This is despite the UFU accepting that Mr Youssef and Mr Davies had the responsibility and authority to make an assessment as to whether the MFB could assist the CFA.[339]

The UFU also took the position in its grievance that the transfer involved not providing entitlements under the 2010 Agreement by directing firefighters to perform the work that was said to consist of facilitating the: (i) transport, (ii) operation, and (iii) training of the MFB BA Service Pod.[340]

However, under cross examination Mr Ward was not able to provide any clear answer as to what these entitlements for the transport, operation or training were, or on what basis they would be provided.[341]

For example, regarding transport, see the following exchange beginning at Transcript PN8293:

> *Right. Now, having been taken to the arrangements between the MFB and CFA, can we agree that firefighters were at most going to be required to drive the BA Pod up to Bayswater and effectively hand it over to the Bayswater CFA, weren't they?---Yes.*
>
> *That's work that firefighters do, driving around in appliances with perhaps a pod on the back, don't they?---Yes.*
>
> *The entitlements for that are pretty clearly that they get paid under the EB, aren't they?---Yes.*

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[337] Statement of Davies (**MFB-31**) at [81], [84] and [89]
[338] See for example Ward at PN8260-8262; PN8289
[339] Ward at PN8264-8265 and PN8270
[340] Statement of Davies (**MFB-31**) at [77]
[341] Ward at PN8293 – PN8306

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU were able to use the dispute resolution procedure contained at clause 19 to invoke the status quo to prevent the movement of resources by the MFB. The asserted justification for the grievance does not survive scrutiny – as is evident in the cross examination of Mr Ward.[342]

6. Effect of the dispute

The effect of the dispute, and the UFU's ability to use the status quo provisions in the dispute resolution process, was that:

(a) the MFB was not able to locate its resources as determined was appropriate by its most senior of officers (Mr Davies and Mr Youssef); and

(b) the MFB's ability to manage its statutory obligations and functions under the MFB Act were curtailed;[343] and

(c) an opportunity to strengthen interoperability between the two agencies and to increase protection to the community was lost.[344]

The MFB position is that it is a bad outcome that the 2010 Agreement should give the UFU the ability to 'veto' an operational decision, or to use the status quo provision in the dispute resolution clause to prevent the MFB from carrying out an operational decision as determined by its most senior of operational firefighters.

The dispute resolution procedure in the 2010 Agreement currently does that, and the UFU have used it to this effect.

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[342] Ward at PN8293 – PN8323.
[343] Statement of Davies (**MFB-31**) at [85]
[344] Statement of Davies (**MFB-31**) at [90] – [91]

Appendix M

Dispute regarding personal internet use

1. Outline of dispute

In August 2012 the MFB commenced a review of its IT information and support systems. The review identified that there was a significant volume of internet traffic in the MFB, a large proportion of which was related to non-business use, which was slowing down the organisation's internet network. Accordingly, the MFB proposed to seek to reduce the amount of internet traffic, as an alternative to upgrading the connection which was potentially quite costly. This reduction was to be achieved primarily by imposing a 60 minute time limit on access to non-business related websites.[345]

The 60 minute limitation was endorsed by the ELT[346] but, upon implementation of the time limit, the UFU notified a dispute claiming that it was a change on which the MFB was required to consult, and that it was affecting employees' ability to carry out their work.[347] Despite the MFB then attempting to consult with the UFU on the matter for 5 months, which included the parties attending a conciliation conference and arbitration at the FWC, the parties did not reach agreement on the proposed introduction of a 60 minute limitation on personal internet use.[348]

Commissioner Roe handed down a decision on the arbitration stating that the MFB were required to consult on the proposal by virtue of the broad scope of clauses 15 (Introduction of Change) and clause 13 (Consultative Process) of the 2010 Agreement, but that there was no useful purpose to direct that further consultation take place.[349]

The MFB has not introduced a time limit on personal internet use.

2. Relevant provisions of the 2010 Agreement

Clause 15 – Introduction of Change

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 still apply.'*

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

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[345] Statement of Craig Lloyd (**MFB-17**) at [22] – [35]
[346] Statement of Craig Lloyd (**MFB-17**) at [34]
[347] Statement of Craig Lloyd (**MFB-17**) at [40]
[348] Statement of Craig Lloyd (**MFB-17**) at [79]. See also the decision of Commissioner Roe (**CL-19** to statement of Lloyd (**MFB-17**)) at [70].
[349] Statement of Craig Lloyd (**MFB-17**) at [80], statement of Janette Pearce (**MFB-29**) at [53] – [54]. See also the decision of Commissioner Roe (**CL-19**) at [86] – [88].

***Clause 19 – Dispute Resolution,* in particular:**

> *'19.4. While the above* [dispute resolution] *procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Craig Lloyd (**MFB-17**) at [21] – [85];
- the witness statement of Janette Pearce (**MFB-29**) at [36] – [55];
- the reply statement of Janette Pearce (**MFB-30**) at [24] – [27]; and
- Transcript, including at Transcript PN1788 – Transcript PN1794 and Transcript PN1876 – Transcript PN2008 (Mr Lloyd).

The MFB's initial position was that the implementation of a restriction on access to the internet for personal use was permitted within the MFB's current policy, which stated that 'limited personal use [of the internet] is permitted' and that excessive personal use was not permitted.[350] Accordingly, the MFB did not believe that it was a matter on which it was required to consult with the terms of the 2010 Agreement.[351]

However, following the grievance raised by the UFU stating that the MFB were required to consult, and the Recommendation[352] of the FWC following the conciliation conference, the MFB sought to undertake limited consultation with the UFU in accordance with the Recommendation. The UFU did not respond to various MFB requests for feedback on implementation of the proposal,[353] but did ask a number of questions which the MFB considered irrelevant to the proposal.[354] Commissioner Roe, in his decision on the matter handed down on 17 July 2014 (**CL-17** to the statement of Craig Lloyd (**MFB-17**)) found that the UFU had not taken the opportunity to undertake this consultation.[355] Under cross examination by Mr Whelahan regarding the lack of response from the UFU in this regard, Ms Krouskos, a junior industrial officer for the UFU who had notified the MFB of the initial grievance, stated that she did not respond on behalf of the UFU because she didn't have time.[356]

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[350] Statement of Craig Lloyd (**MFB-17**) at [41] and Lloyd at PN1879 - 1883
[351] Statement of Janette Pearce (**MFB-29**) at [38]
[352] Annexure **CL-9** to the statement of Craig Lloyd (**MFB-17**) at page 63
[353] Statement of Craig Lloyd (**MFB-17**) at [57] – [76], statement of Janette Pearce (**MFB-29**) at [42] – [51]
[354] Lloyd at PN2001 – PN2002
[355] Statement of Craig Lloyd (**MFB-17**) at [79]. See also the decision of Commissioner Roe (**CL-19**) at [70].
[356] Krouskos at PN9744

The UFU re-enlivened the grievance at the FWC, and the final outcome of the matter was the decision of Commissioner Roe handed down on 17 July 2014 (**CL-17** to the statement of Craig Lloyd (**MFB-17**)). Commissioner Roe found that the MFB was required to consult on the proposal by virtue of the broad scope of clauses 15 (Introduction of Change) and clause 13 (Consultative Process) of the 2010 Agreement, but that there was no useful purpose to direct that further consultation take place.[357]

The MFB has not introduced a time limit on personal internet use subsequent to this decision. The MFB considers that it would be unable to implement because consultation is exhausted and the MFB did not have the agreement of the UFU to the proposal.[358]

Commissioner Roe also noted in his decision (**CL-17** to the statement of Craig Lloyd (**MFB-17**)) that:

An examination of the minutes of the consultative committee meetings...shows that many changes which might in other workplaces be regarded as matters for management prerogative are on the agenda pursuant to Clauses 15 and 30 and other clauses of the Agreement...[359]

3. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Rini Krouskos (**UFU-25**) at [12] – [15] and [97] – [113];
- the witness statement of Alan Drury (**UFU-58**) at [11] – [15];
- Transcript, including at Transcript PN6332 – Transcript PN6386 (Mr Tisbury), Transcript PN7569 (Mr Hamilton), Transcript PN9703 – 9844, Transcript PN10002 and Transcript PN10020 – Transcript PN10036 (Ms Krouskos).

The UFU position was that it agreed in principle to the proposal,[360] but that the MFB was required to consult and further issues were also raised by the UFU. In the limited consultation that took place between the parties, the UFU asked the MFB a large number of questions about the restriction, a number of which were about the proposed cost savings.[361] The UFU position was that these questions were relevant to whether or not they would agree to the proposal to implement the 60 minute limit on access to non-business related websites.[362]

4. Operation of the 2010 Agreement

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[357] Statement of Craig Lloyd (**MFB-17**) at [80], statement of Janette Pearce (**MFB-29**) at [53] – [54]. See also the decision of Commissioner Roe (**CL-19**) at [86] – [88].
[358] Lloyd at PN1944 – PN1950 and reply statement of Janette Pearce (**MFB-30**) at [27]
[359] Statement of Craig Lloyd (**MFB-17**) at [78]
[360] Krousko at PN9725
[361] Statement of Craig Lloyd (**MFB-17**) at [66]. See Krouskos at PN9752-PN9790
[362] Krouskos at PN9754 – PN9765

The 2010 Agreement operates to require the MFB to consult with the UFU, and reach agreement on, any proposal which constitutes 'change in matters pertaining to the employment relationship'.[363] The dispute resolution process at clause 19 permits the UFU to initiate a grievance and prevent that change from happening if it considers that consultation has not occurred or that insufficient consultation has occurred, regardless of the reason for the grievance.

5. Effect of the dispute

The effect of the dispute, and the UFU's ability to use the status quo provisions in the dispute resolution process, was that:

(a) the MFB sought to undertake consultation with the UFU, even though at the time it considered it was not required to under the 2010 Agreement;[364]

(b) the UFU did not undertake the limited consultation process as recommended by the FWC;

(c) the matter was referred back to the FWC where Commissioner Roe found that the MFB were required to consult on the matter due to the broad scope of the consultative provisions under the 2010 Agreement;[365]

(d) the MFB considered that consultation was exhausted;[366]

(e) the proposal has never been implemented as the MFB did not have the agreement of the UFU.[367]

The MFB position is that the requirement to consult and reach agreement with the UFU on all matters pertaining to the employment relationship in the broad manner that is currently required under the 2010 Agreement, stifles any change it may determine is appropriate. This example shows that the MFB was unable to implement what ordinarily ought to be considered a reasonable limitation on personal internet use at work. Further, the process remained in a 'status quo' situation whilst the most junior industrial officer of the UFU simply did not 'have time' to progress the matter in accordance with a recommendation of the FWC. That is a poor outcome.

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[363] Clause 15 of the 2010 Agreement

[364] Statement of Craig Lloyd (**MFB-17**) at [79]. See also the decision of Commissioner Roe (**CL-19**) at [70].

[365] Statement of Craig Lloyd (**MFB-17**) at [80], statement of Janette Pearce (**MFB-29**) at [53] – [54]. See also the decision of Commissioner Roe (**CL-19**) at [86] – [88].

[366] Lloyd at PN1944

[367] Lloyd at PN1949

Appendix N

Equipment display at Bayswater CFA

1. Outline of issue

The equipment display at the Bayswater CFA was a small scale inter-agency drill involving the MFB and the CFA. The purpose of the drill was to demonstrate and discuss the capability and equipment of the two services.[368]

The CFA was particularly interested in seeing the MFB's breathing apparatus and HAZMAT gear. The CFA was about to undertake HAZMAT and search and rescue training, and hoped that as part of its preparation for the training, CFA members could familiarise themselves with the MFB's equipment.[369]

The display was scheduled on 17 May 2011 at 7:30pm. Only on-shift employees were asked to attend and employees were eligible for their usual allowances.[370]

Appliances involved in the display were taken outside the MFD, but only by approximately two kilometres. Fire coverage was maintained in the MFD. DCO David Youssef was aware of the arrangements.[371]

At 7:02pm on 17 May 2011, 30 minutes before the event was due to start, the UFU issued a bulletin stating that it had raised a grievance. The bulletin did not identify what matters had led to the grievance, other than the MFB's failure to consult.[372]

DCO Youssef directed that the drill was to proceed regardless of the bulletin.[373]

Station Officers at Ringwood and Croydon fire stations informed the MFB that they would not attend the display with appliances because the UFU had said no.[374] As a result, at the eleventh hour the event had to proceed in a modified form with fewer appliances attending.[375]

2. Relevant provisions of the 2010 Agreement

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

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[368] Statement of Andrew O'Connell (**MFB-25**) at [40] and [42].
[369] Statement of Andrew O'Connell (**MFB-25**) at [41].
[370] Statement of Andrew O'Connell (**MFB-25**) at [44].
[371] Statement of Andrew O'Connell (**MFB-25**) at [45].
[372] Statement of Andrew O'Connell (**MFB-25**) at [49] – [50].
[373] Statement of Andrew O'Connell (**MFB-25**) at [51].
[374] Statement of Andrew O'Connell (**MFB-25**) at [52].
[375] Statement of Andrew O'Connell (**MFB-25**) at [54].

Clause 19 – Dispute Resolution

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in the witness statement of Andrew O'Connell (**MFB-25**) at [40] – [54].

The MFB's position at the time was that consultation with the UFU was not required before multi-agency events. Consultation with the union prior to multi-agency events was not the usual practice and had not been done in the past.[376]

Further, inter-agency drills are a routine part of MFB interoperability activity.[377]

The MFB only required employees on-shift to attend the display and their usual allowances would be paid.[378]

The MFB maintained fire coverage in the MFD and the Deputy Chief Officer was aware that appliances would be attending the event.[379]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Danny Ward at [65] – [66]; and
- Transcript PN8177 – Transcript PN8217.

The UFU position appears to be that the MFB attempted to take appliances out of the MFD and that the MFB had failed to consult with the UFU in respect of the event.[380] However, the UFU's concern about fire coverage in the MFD was not made apparent in its bulletin of 17 May 2011. The bulletin stated that the grievance related *'to a number of matters, including a complete absence of consultation.'*[381]

In cross examination, Mr Ward also suggested that the UFU's concern was in relation to drill site approval forms. He said at Transcript PN8202 and Transcript PN8203:

> *All right. Your position was back in 2011 regarding this attendance at the equipment display that because there had been no consultation then the UFU was invoking the*

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[376] Statement of Andrew O'Connell (**MFB-25**) at [17].
[377] Statement of Andrew O'Connell (**MFB-25**) at [51] and AO-10.
[378] Statement of Andrew O'Connell (**MFB-25**) at [44].
[379] Statement of Andrew O'Connell (**MFB-25**) at [45].
[380] Statement of Danny Ward (**UFU-19**) at [66].
[381] Statement of Andrew O'Connell (**MFB-25**) at [50] and AO-9.

status quo to prevent attendance of appliances at the equipment display?---I believe due to the fact that there was no drill site approval for them, which we were going to drill, that that is why it may have been stopped.

No, you see, the drill site approval forms - can I suggest that this suggestion about the drill site approval forms doesn't appear in either your statement, it doesn't appear in the documents or the grievance. It's the first time, I suggest, the commission might have heard a suggestion that because some form hadn't been completed, that the grievance was filed to prevent the display proceeding. Do you understand that?---What I'm putting to you is my belief, and my belief is that the drill site approval form, which has been endorsed and used by both parties since 2006, had not been properly adhered to.

Mr Ward also gave evidence that had the union been notified of the event earlier, it could have lodged the grievance earlier. He said at Transcript PN8214 – Transcript PN8217:

Well, can we agree that this is an example where the UFU did use the grievance procedure to prevent the MFB moving appliances as they saw fit?---I believe the grievance procedure is put there so that we can solve any problems together through consultation and agreement, and that's what it's there for. It's not to stop anything.

But that's what - exactly what happened here, wasn't it?---Well, I think if you follow the grievance procedures you will find that there is a procedure in place for us all to adhere to and try and solve the grievance.

But in the circumstances here where the grievance is lodged half an hour or an hour before the event is to take place, in a practical world there's no possible way of getting all the way through the grievance procedure, is there?---If the union was notified beforehand it may have been able to lodge it earlier.

The practical effect of what happened here was to prevent the attendance of the MFB at this equipment display. Correct?---I don't believe so.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU was able to use the dispute resolution procedure contained at clause 19 of the 2010 Agreement to invoke the status quo at the 11th hour. This prevented the MFB attending the equipment display event at the Baywater CFA.

6. Effect of the dispute

The effect of the dispute, and the UFU's ability to use the status quo provisions in the dispute resolution process, was that:

(a) the MFB was unable to send many of its appliances to an inter-agency event which had been planned to strengthen interoperability;[382]

(b) MFB firefighters and CFA firefighters were unable to benefit from the additional MFB appliances which otherwise would have attended the event;[383]

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[382] Statement of Andrew O'Connell (**MFB-25**) at [42] and [52].
[383] Statement of Andrew O'Connell (**MFB-25**) at [41], [43] and [52].

(c) the MFB was made to look unprofessional due to the last minute nature of the dispute;[384] and

(d) the MFB was unable to move its resources as it considered appropriate and necessary.[385]

The MFB position is that it is a bad outcome that the 2010 Agreement should give the UFU the ability to 'veto' an operational decision, or to use the status quo provision in the dispute resolution clause to prevent the MFB from carrying out an operational decision as determined by senior firefighters.

The dispute resolution procedure in the 2010 Agreement currently does that, and the UFU have used it to this effect.

The Bayswater CFA equipment display ought to have proceeded and it is a poor outcome that it did not proceed as planned as a result of the particular grievance lodged by the UFU.

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[384] Statement of Andrew O'Connell (**MFB-25**) at [54].
[385] Statement of Andrew O'Connell (**MFB-25**) at [52].

Appendix O

Introduction of MFBSafe

1. Outline of issue

In early 2011, the MFB sought to introduce new software used for recording health and safety exposures, incidents and injuries, which the MFB has a legislative obligation to report. The new software was required because the reporting capacity of, and the data generated by, the previous software used by the MFB was insufficient.[386] In addition to greater capacity to collect meaningful data from the software which would in turn mean greater ability to investigate and prevent injuries and exposures, its introduction was also intended to result in broader changes in the processes and the culture of accountability in relation to the investigation and prevention of injuries and exposures within the MFB.[387]

The consultation process in relation to the implementation of MFB Safe, which was essentially an off the shelf program previously implemented by the CFA and other organisations such as Parks Victoria, took around two years. The two year delay was in part a result of continual requests for additional information and questioning of the input fields built in to the program. The difficulties and delay encountered in obtaining agreement to implement MFBSafe resulted in the proposed broader cultural safety changes being abandoned along the way.[388] The software was ultimately implemented in around January 2014.[389]

2. Relevant provisions of the 2010 Agreement

Clause 15 - Introduction of change:

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.'*

***Clause 13 - Consultative process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Margaret Mary Wilson (**MFB-12**) at [8] - [52];
- the reply witness statement of Margaret Mary Wilson (**MFB-13**) at [7] – [14]; and

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[386] Statement of Margaret Mary Wilson (**MFB-12**) at [8] – [11]
[387] Statement of Margaret Mary Wilson (**MFB-12**) at [19] – [21]
[388] Statement of Margaret Mary Wilson (**MFB-12**) at [46] – [51]
[389] Statement of Margaret Mary Wilson (**MFB-12**) at [45]

- Transcript PN965 – Transcript PN1145 (Ms Wilson).

The MFB had identified the need for new health and safety reporting software by 2010.[390] The consultation process took two years, which is an inordinate amount of time for a mechanism which was effectively an off-the-shelf product requiring little configuration and therefore should have been easy to implement.[391] As set out in Mr Wilson's witness statement at paragraph [46]:

> *The process of consultation in relation to MFBSafe took around two years. I was leading the initiative for 12 -18 months of that time. In my previous roles involving the rolling out of software, I oversaw the roll out of a whole recruitment candidate arrangements system across the Asia Pacific region in around 6 to 8 months. By comparison, two years for the introduction of an off the shelf reporting program across one organisation is an unproductive amount of time.*

There were protracted discussions about particular fields, the ultimate exclusion of which resulted in a lower quality outcome with pertinent information not being collected.[392] Discussion of, and decisions regarding, the inclusion of particular fields, occurred at the OHS Policy Subcommittee and were then needlessly repeated at the Training Subcommittee.[393] As set out in Ms Wilson's witness statement (**MFB-12**) at [42]-[43]:

> *The key issue encountered in the Training Subcommittee was its questioning of the content of the fields, in particular the Fields that had been the subject of considerable discussion at the OHS Police Subcommittee.*
>
> *During one Training Subcommittee meeting, we conducted a session about how MFBSafe would be used. The point of the demonstration was to discuss training; however the focus of the discussion moved to the content of the Fields. As noted above, the inclusion of the Fields had already been subject to discussion at the OHS Policy Subcommittee and agreed. The outcome of the Training Subcommittee wasn't actually about training in the end, it was about the Fields. This waylaid the discussion around training.*

There is no practical explanation for this significant delay, particularly when similar software was rolled out to comparable organisations like the County Fire Authority in a quarter of that time or less.[394] As set out in Ms Wilson's reply witness statement (**MFB-13**) at paragraph [12]:

> *I understand that Parks Victoria implemented equivalent software in 12 weeks. I understand that the CFA implemented equivalent software in six months (and three of those months were for an additional module which the MFB had not purchased). I understand that the State Emergency Service implemented the same software in approximately three to four months. Two of these organisations are emergency services, and both include the additional complexities of volunteer staff, which was not relevant for the MFB. I reiterate my comment at paragraph 47 of my first statement that there is no practical explanation for why the introduction of MFBSafe took so long in comparison to other organisations.*

Protracted discussions regarding the fields to be included in the software and the eventual exclusion of a number of fields, means that categories of meaningful data are not captured by the

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[390] Statement of Margaret Mary Wilson (**MFB-12**) at [11]
[391] Statement of Margaret Mary Wilson (**MFB-12**) at [22] and [46]
[392] Reply statement of Margaret Mary Wilson (**MFB-13**) at [10]
[393] Statement of Margaret Mary Wilson (**MFB-12**) at [42]-[43]
[394] Statement of Margaret Mary Wilson (**MFB-12**) at [46]-[48] and Reply Statement of Margaret Mary Wilson (**MFB-13**) at [12]

software in the form it was ultimately implemented.[395] As set out in Ms Wilson's reply witness statement (**MFB-13**) at paragraph [10]:

I believe that these fields were removed as part of the consultative process. This supports my view that the process was unproductive, as pertinent information is now not being collected. The 'basic information' requested by the UFU were software configuration tables and a comparison of the systems of REII, the CFA product and the Pan Software product. It may well have taken some time to collate this information. The information ultimately had no bearing on the implementation of MFBSafe. This reinforces my point that the consultative process required the MFB to spend considerable time on meaningless activities.

The associated delay also resulted in the broader aims for the improvement of the safety culture and processes within the MFB being effectively abandoned.[396] As set out in Ms Wilson's witness statement (**MFB-12**) at paragraphs [48] and [51]:

> *The consultation process is in part responsible for this delay, and this has been to the detriment of the aims we had for the introduction of MFBSafe and the associated improvement in safety culture at the MFB. ...*
>
> *The drawn out consultation process resulted in abandonment of the broader changes in safety culture I refer to above. By the time MFBSafe was rolled out, the management of Work Health and Safety had no knowledge of the originally intended proposal to transfer the responsibility of investigation from the Commander to the officer in charge. The introduction of MFBSafe could have been used as a catalyst for positive changes in the health and safety space around reporting and investigation of safety incidents, and a renewed focus on the importance of reporting near misses.*

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Casey Lee (**UFU-23**) at [93]-[99].

The UFU position is that the consultation process worked effectively in relation to the implementation of MFBSafe and in particular that necessary changes were agreed upon through the process:

> *I disagree with Ms Wilson's contention made in paragraph 46 that the consultation process for MFBSafe was unproductive or that the process of consultation added no value to MFBSafe, as asserted in paragraph 50. Important changes were made to the way in which employees were able to report injuries and incidents. For example, the ability for employees to notify of combined chemical and biological exposures. An improved training model that satisfied all parties was achieved. Employee representatives were able to assure employees that the information they provided to MFBSafe would not be sent to the MFB Workcover Insurance Providers, and that the*

[395] Statement of Margaret Mary Wilson (**MFB-12**) at [51] and Reply Statement of Margaret Mary Wilson (**MFB-13**) at [8]-[10]
[396] Statement of Margaret Mary Wilson (**MFB-12**) at [48] and [51]

MFB maintained ownership of the system and data. These issues had been of concern to employees using REII in the past.[397]

Mr Lee's evidence is that the delay in implementation was contributed to by the MFB taking:

- '*nearly 5 months, between 8 February 2012 until 5 June 2012 to provide the UFU with some of the basic information I had requested*';
- '*from 23 November 2011 until 21 August 2013 for it to develop a training package for MFBSafe*';
- no action for months.[398]

Mr Lee's evidence is also that:

- the pilot project was also delayed from April until November 2012 due to technical difficulties with configuration of data;[399]
- the implementation of MFBSafe was not straightforward just because the software was already used by the CFA;[400] and
- broader changes in safety culture were not abandoned.[401]

5. Operation of the 2010 Agreement

The effect of the operation of clause 13 of the 2010 Agreement is that, absent agreement of the UFU, the MFB was unable to implement the new software it considered to be necessary and appropriate for health and safety purposes within a reasonable time.

6. Effect of the issue

It is clear from the evidence of both the MFB and the UFU that the implementation of MFBSafe took a significant amount of time and that the consultation process contributed to this delay. Even though the UFU's position is that the key contributor to the delay was the time the MFB took to provide requested information to the UFU, the provision of that information was necessary by virtue of the consultation requirements.

The effect was that although MFBSafe was eventually implemented, the consultation process meant that:

- it took an unreasonable amount of time than it ought to have taken to be implemented, with the effect being that valuable data was not able to be collected for that period of time and the organisation as a whole as well as individual firefighters using the software did not have the benefit of the upgrade;

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[397] Statement of Casey Lee (**UFU-23**) at [195]
[398] Statement of Casey Lee (**UFU-23**) at [196]
[399] Statement of Casey Lee (**UFU-23**) at [197]
[400] Statement of Casey Lee (**UFU-23**) at [198]
[401] Statement of Casey Lee (**UFU-23**) at [199]

- the exclusion of particular fields as a result of the process requiring agreement meant that some useful information was and is not captured; and
- over the two year period, the MFB lost sight of broader safety changes that it intended would accompany the introduction of the software as a result of that delay (although the UFU denies this).

The 2010 Agreement means that the MFB cannot take action or make decisions about anything relating to the employment relationship without the agreement of the UFU. In this example, the process to reach agreement resulted in an inordinate amount of time being spent trying to reach agreement with the UFU on a program that the MFB had determined would enhance the reporting of health and safety hazards and injuries. The 2 year period for implementation of MFBSafe compares poorly with other organisations that adopted the same off the shelf software: CFA and Parks Victoria. The long process meant that further health and safety cultural changes were not implemented as was originally intended.

This outcome is detrimental to the ability of the MFB to best monitor and prevent health and safety hazards.

Appendix P

Wildfire awareness sessions

1. Outline of issue

In late 2012, the MFB developed a wildfire awareness drill session to enhance firefighters' understanding of how to respond to wildfire events.[402] Following the first drill in 2012, Commander O'Connell received a number of requests from operational staff to have the same session delivered across all stations in the South East Metropolitan Region. Commander O'Connell secured additional funding to run these sessions.[403]

By 2013, all operational staff in the South East Metropolitan Region were given the opportunity to participate in the training drill. Operational staff in the North West Metropolitan Region began to request access to the same session, based on feedback from crews that attended from the South East. The MFB ran the sessions again in November and December 2013.[404]

There was a high level of interest from operational staff in the South East Metropolitan Region in attending a similar session in 2014.[405]

The 2014 session was developed around the scenario of a strike team deployment protecting a township. The session was due to run in Gembrook, one of the 'hotspots' for bushfires in Victoria.[406]

Due to a series of very high temperature days and MFB strike teams responding to significant fires in the Victoria, the session was postponed.[407]

On 28 January 2014, Commander O'Connell was preparing to commence the sessions again, starting the following day. Commander O'Connell notified the session facilitators of the resumption of the sessions. Unexpectedly, he received an email from the UFU seeking '*confirmation that this matter will be progressed through the consultation process.*'[408] This was the first time that the UFU raised objections to the session, despite Commander O'Connell having notified employees of the proposal on 4 January 2014.[409]

As a result of the last-minute email from the UFU, the MFB decided to postpone the sessions until it could properly respond to the UFU.[410] While the issue was being resolved, Victoria was

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[402] Statement of Andrew O'Connell (**MFB-25**) at [75] – [76].
[403] Statement of Andrew O'Connell (**MFB-25**) at [77] – [78].
[404] Statement of Andrew O'Connell (**MFB-25**) at [79] – [80].
[405] Statement of Andrew O'Connell (**MFB-25**) at [81].
[406] Statement of Andrew O'Connell (**MFB-25**) at [82].
[407] Statement of Andrew O'Connell (**MFB-25**) at [87] – [90].
[408] Statement of Andrew O'Connell (**MFB-25**) at [91] – [92].
[409] Statement of Andrew O'Connell (**MFB-25**) at [99].
[410] Statement of Andrew O'Connell (**MFB-25**) at [95] – [96].

subject to several more days of severe weather which resulted in a number of major fires.[411] But for the UFU raising its concerns at the eleventh hour, the MFB could have run at least one session on 29 January 2014 as planned.[412] Instead, the MFB had to postpone the exercise program until next summer.[413]

Although the MFB also decided not to continue with the drills for a number of other reasons, including the high fire danger days, that the UFU raised its concerned so late contributed to the fact that the MFB were unable to run any sessions in the 2013/2014 summer.[414]

2. Relevant provisions of the 2010 Agreement

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [75] – [99];
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [47]; and
- Transcript PN3220 – Transcript PN3235.

The MFB is of the view that it frequently runs drills without incident and it is standard practice not to engage in consultation with the UFU for these exercises. In this example, it is unclear why the UFU raised concerns in respect of consultation. This is particularly so in light of the fact that the MFB ran a similar exercise in 2012 and 2013 without consultation through the 2010 Agreement process and without incident. Indeed, there was only positive feedback and requests from operational firefighters for further opportunities to participate in such exercises.[415]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Michael Tisbury (**UFU-14**) at [106] – [108];
- the witness statement of Dimitra Eirini Sophia Krouskos (**UFU-25**) at [4]; and
- Transcript PN7191 – Transcript PN7196 (Mr Tisbury).

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[411] Statement of Andrew O'Connell (**MFB-25**) at [96].
[412] See PN3232 – PN3233.
[413] Statement of Andrew O'Connell (**MFB-25**) at [96].
[414] Statement of Andrew O'Connell (**MFB-25**) at [93] – [95]; transcript at PN3232.
[415] Statement of Andrew O'Connell (**MFB-25**) at [97] – [98].

The UFU's position appears to be that its email to Commander O'Connell on 28 January 2014 did not raise a formal grievance[416] or '*suggest the training sessions were a bad idea.*'[417]

Mr Tisbury at [107] of his statement (**UFU-14**) states that the UFU was concerned about the absence of consultation because Commander O'Connell had not consulted in relation to another drill in 2013. Mr Tisbury alleges that in 2013, members of the UFU complained that untrained CFA volunteers were asked to use dangerous MFB rescue equipment and an accident occurred.

In response, Commander O'Connell advised that:

> '*I have conducted a search of the MFB REII system, which was used to register all injuries to staff during that period. I did not find any record of any injury recorded by C platoon personnel from Eastern District. I do not recall an accident occurring at any road accident rescue drill I have run and cannot find any rescue drills listed in my calendar during 2013.*'[418]

Mr Tisbury subsequently amended his statement to state that an accident '*could have occurred*'.[419]

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU was able to use the consultation provisions of the 2010 Agreement to delay the commencement of the wildfire training drills in circumstances where the drill had been carried out many times before without any approval having to be obtained from the UFU in order for the training drills to proceed.

6. Effect of the dispute

In order to respond sufficiently to the UFU's concerns, the MFB delayed the commencement of the wildfire training drills. The delay meant that the wildfire awareness program was affected by severe weather and was unable to proceed. Had the UFU not raised its concerns at the eleventh hour, the MFB could have proceeded with at least one day of the drill on 29 January 2014. This is a bad outcome for the MFB and those firefighters who could have otherwise participated in the training drill on 29 January 2014.

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[416] Statement of Michael Tisbury (**UFU-14**) at [106]; statement of Dimitra Eirini Sophia Krouskos (**UFU-25**) at [4].
[417] Statement of Michael Tisbury (**UFU-14**) at [106].
[418] Reply statement of Andrew O'Connell (**MFB-26**) at [54].
[419] PN6145 – PN6146.

Appendix Q

Merlin Telemetry

1. Outline of issue

The Merlin Telemetry trial was an initiative to address occupational health and safety issues associated with the MFB's breathing apparatus system.[420]

This issue exemplifies the delays created by the rigid consultation process under the 2010 Agreement when implementation of a trial was sought in 2012/13.

The Merlin Telemetry is a radio transponder which transmits distress signals and information about how much air time is left in a breathing apparatus set.[421]

As the MFB's standard breathing apparatus sets were approaching the end of their service life, and it was likely that the MFB would go to tender for the purchase of new BA sets in around 18 months' time, the MFB wanted to conduct a trial of the Merlin Telemetry to be in a position to know if such a set would be critical to operations going forward.[422]

Progressing the matter was of considerable importance from a health and safety perspective. There had been significant issues with the existing equipment, which had been highlighted by a coroner in Queensland after the death of two firefighters. The Merlin Telemetry was considered to provide a significant safety enhancement to firefighters.[423]

At the time of the proposed trial, the Merlin Telemetry was being used extensively across Europe and also the fire service in South Australia used equipment with a similar functionality. Commander O'Connell's evidence was that, '*the case for its introduction was compelling.*'[424]

On 26 July 2012, the Regional Operations Committee (a committee of senior operational staff from both North West and South East regions) endorsed an operational trial of the Merlin Telemetry at South Melbourne fire station (fire station 38).[425]

On 31 July 2012, Commander O'Connell emailed Brian Whittaker, Brendan Angwin, Brad Quinn, Brendan Veal, David Hamilton, Casey Lee and the UFU office. All of these people would have a role in the approval process to get the trial running. Commander O'Connell told them that he

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[420] Statement of Andrew O'Connell (**MFB-25**) at [202].
[421] Statement of Andrew O'Connell (**MFB-25**) at [203].
[422] Statement of Andrew O'Connell (**MFB-25**) at [204].
[423] Statement of Andrew O'Connell (**MFB-25**) at [205] – [208].
[424] Statement of Andrew O'Connell (**MFB-25**) at [209].
[425] Statement of Andrew O'Connell (**MFB-25**) at [211] - [214].

would like to meet with them to discuss the parameters of the trial and to discuss any issues in relation to training.[426]

Mr Lee advised Commander O'Connell that he should refer the matter to the consultative committee for consultation.[427]

On 12 November 2012, Commander O'Connell presented the trial to the ELT and requested that the ELT endorse the trial so that the project could progress to the Consultative Committee for implementation and approval.

Commander O'Connell presented the project to the Consultative Committee on 6 February 2013. Although the Consultative Committee endorsed the trial for 12 months,[428] there were then issues and delays encountered with the matter being referred to the Training Sub-Committee. The Consultative Committee required all training issues to be referred to the training sub-committee.[429]

Commander O'Connell then presented at the training sub-committee on 20 February 2013[430] and at the V&E Sub-Committee on 27 February 2013. On 15 May 2013 Commander O'Connell presented again to the training sub-committee, which endorsed the trial 'subject' to the provisions of a training package.[431] After a series of further meetings and correspondence regarding the training package, it was determined that a training package in fact was not required and training was able to commence 1 September 2013

At [236] – [238] of his statement (**MFB-25**) Commander O'Connell stated:

> *[236] On 21 August 2013 I emailed James Holyman to advise that 'I can finally report that we have managed to negotiate the multitude of committee's (sic) required to get (the) gear into service.' I confirmed that the training would start on 1 September and that the Merlin Telemetry would hopefully be in service by mid-October. Now produced and shown to me and marked **AO-87** is a true and correct copy of my email.*
>
> *[237] The Merlin Telemetry was finally put into service on 1 October 2013 for a 12 month field trial. The process took approximately 16 months which was way too long.*
>
> *[238] The Training Sub-Committee's referral of the project to the Training and Development department was misguided and meant that we wasted months needlessly negotiating with the Training and Development department. This was particularly frustrating because Brendan Angwin, the manager of the Training and Development Department, sits on the Training Sub-Committee and should have been aware that trial equipment did not need to be referred to the Training and Development Department as per the advice from Fadia Mitri.*

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[426] Statement of Andrew O'Connell (**MFB-25**) at [214] and **AO-75**.
[427] Statement of Andrew O'Connell (**MFB-25**) at [217] and **AO-76**.
[428] Statement of Andrew O'Connell (**MFB-25**) at [221]..
[429] Statement of Andrew O'Connell (**MFB-25**) at [221] – [222] and **AO-78**.
[430] Statement of Andrew O'Connell (**MFB-25**) at [223].
[431] Statement of Andrew O'Connell (**MFB-25**) at [227].

2. Relevant provisions of the 2010 Agreement

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 88 – Uniforms and Equipment,* in particular:**

> *'88.1 The MFESB and UFU must agree on all aspects of the:*
>
> *...88.1.2 equipment... 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [202] – [238];
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [40]; and
- Transcript PN3181 – Transcript PN3207 (Mr O'Connell).

The MFB's position is that the 2010 Agreement and the requirement for consultation through the Consultative Committee and sub-committee structure created unnecessary delay in implementing the Merlin Telemetry trial, without any significant benefit being obtained from that process.[432] In this example, Commander O'Connell's evidence was that, '*The process took approximately 16 months which was way too long.*'[433]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of David Hamilton (**UFU-16**) at [93].

Mr Hamilton cites the Merlin Telemetry trial as an example of an item that progressed through the Consultative Committee in one meeting. However, as Commander O'Connell's evidence above illustrates, the sub-committee processed delayed the matter further.

The UFU did not provide any other evidence in respect of this issue.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the rigid consultations processes delayed the introduction of the Merlin Telemetry trial.

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[432] Statement of Andrew O'Connell (**MFB-25**) at [238].
[433] Statement of Andrew O'Connell (**MFB-25**) at [237].

6. Effect of the issue

The delays and the consultation requirements under the 2010 Agreement were of no benefit to the MFB or firefighters in this instance. To the contrary, the rigidity of the consultation requirements delayed the introduction of important health and safety equipment. Such delay represents a poor outcome for firefighters and the MFB.

Appendix R

Issue regarding Ladder Platform Replacement

1. Outline of issue

In June 2010, the MFB ordered two new 44 metre Bronto Ladder Platforms as replacements for two existing Bronto Ladder Platforms which had reached their 15-year lifespan. The replacements were 'like for like' with the existing appliance being used in terms of their capability.[434]

On 30 May 2011, the UFU raised a grievance on the basis that the MFB had not consulted in relation to the Ladder Platform replacement as required under clause 88 of the 2010 Agreement and status quo was invoked by the UFU, stating that 'the proposed appliances must not be implemented.'[435]

The Ladder Platforms were delivered in May 2012.[436] At the Consultative Committee meeting on 1 August 2012, the UFU did not endorse the MFB's proposal to commission the Ladder Platforms and sought to begin consultation again, prior to endorsing the Ladder Platforms and to act as if the decision to purchase the appliances had not already been made and carried out.[437]

In October 2012, as part of the consultation process, a comparison exercise was conducted. During this exercise, there was an issue with the telescopic fly-booms (a small telescopic boom (arm) that connects the main booms to a cage) so that when it deployed there was a three metre gap between the evacuation ladder on the cage and the ladder that was on the boom.[438]

Since this demonstration, the Ladder Platform replacements have been subject to considerable further consultation and various steps to rectify the issue with the telescopic fly-booms including a risk assessment and the commissioning of two additional ladder sections to be fitted to the two Ladder Platforms.[439]

2. Relevant provisions of the 2010 Agreement

***Clause 88 – Uniforms and Equipment,* in particular:**

> *'88.1. The MFESB and UFU must agree on all aspects of the:*
>
> ...
>
> *88.1.4. appliances;*

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[434] Statement of Darren McQuade (**MFB-27**) at [91]
[435] Statement of Darren McQuade (**MFB-27**) at [51] – [54]
[436] Statement of Darren McQuade (**MFB-27**) at [97]
[437] Statement of Darren McQuade (**MFB-27**) at [100] – [101]
[438] Statement of Darren McQuade (**MFB-27**) at [110]
[439] Statement of Darren McQuade (**MFB-27**) at [106] – [133]

to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'

***Clause 13 – Consultative Process,* in particular:**

'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'

***Clause 19 – Dispute Resolution,* in particular:**

'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Darren McQuade (**MFB-27**) at [89] – [133];
- the reply witness statement of Darren McQuade (**MFB-28**) at [26] – [29] and [44] – [47];
- Transcript PN3508 – Transcript PN3524 and Transcript PN3592 – Transcript PN3615 (Mr McQuade), and at Transcript PN1207 – Transcript PN1208 (Mr Youssef).

The MFB's position is as stated by Mr McQuade in his statement (**MFB-27**) at [132] – [133], as follows:

> *Although there were warranty issues with the Ladder Platforms which contributed to the delay in this case of the appliances being commissioned, the ability of the UFU to veto the utilisation of the Ladder Platforms demonstrates the power that it has under the 2010 Agreement.*
>
> *Consultation certainly has a role, but the ultimate decision on important operational issues such as the replacement of appliances which are ending their life-span should be made by the organisation, not the union. If issues are identified with the commission of an appliance, the MFB has the statutory responsibility to eliminate or minimise risks to health and safety. Every step of this process should not be dictated by the union through the consultation process.*
>
> Further, in relation to the three metre gap, as Mr McQuade states at [123]:
>
> *The MFB holds statutory health and safety responsibilities both in respect of its own employees and members of the public. The MFB would under no circumstances have permitted commission of an appliance that posed any lethal risk to the health and safety of its firefighters. The MFB had already identified and suggested an easy and simple remedy by turning off the capability of the appliance to extend so far to allow the 'gap' to arise.*

The MFB position is that the gap would always have been identified as each appliance is subject to a mandatory risk assessment prior to commissioning. Once identified, the MFB were

committed to addressing it.[440] The MFB's point, however, is that the MFB should be able to address it as it considers appropriate, without having the UFU dictate every step of the process.[441]

In this regard, the MFB had identified that the appliance could have been safely used by putting a quick and permanent administrative control in place.[442]

The MFB has sought advice on the gap issue from the manufacturer, and has been informed that the Ladder Platform with the 'gap' is widely used overseas with no issues.[443] Under cross examination, Mr Tibsury for the UFU was unaware of this fact,[444] despite specifically stating that Ladder Platforms is an area he has expertise in.[445]

Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Michael Tisbury (**UFU-14**) at [101] – [105];
- the witness statement of Robert Psaila (**UFU-21**) at [74] – [96];
- Transcript PN7183 – Transcript PN7190 and Transcript PN7315 – Transcript PN7317 (Mr Tisbury), Transcript PN8591 – Transcript PN8593 (Mr Psaila); and Transcript PN10529 – Transcript PN10532 and Transcript PN10543 – Transcript PN10548 (Mr Watt).

The UFU's original position, as contained in the grievance lodged in May 2011, was that the MFB had failed to consult in relation to the purchase of the replacement ladder platforms.[446]

Since the discovery of the fault, mentioned above, the UFU's position has been that the appliance cannot currently be safely used by firefighters as a result of the gap in the ladder.[447] Mr Psaila states in his statement at paragraph 132 that:

> *On the basis of my experience in this matter, if it were not for the consultative process, the MFB would have commissioned these ladder platforms with this significant safety issue. If not for the UFU's insistence on full and proper consultation regarding the introduction of these appliances, the MFB would most likely have not undertaken a full risk assessment as this is not generally done when commissioning appliances that are considered like for like as the MFB claimed these were. This outcome would have been completely unacceptable and lead to a real risk as identified in the MFB's own risk assessment. Despite the obligations of the MFB as an employer, the UFU has a legitimate interest in protecting the health and safety of its members. The MFB agreed*

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[440] Reply statement of Darren McQuade (**MFB-28**) at [29] and [45]; McQuade at PN3517
[441] Statement of Darren McQuade (**MFB-27**) at [133]
[442] For example, Youssef at PN1208 and McQaude at PN3522-PN3523
[443] For example, Statement of Darren McQuade (**MFB-27**) at [129] and Youssef at PN1208
[444] For example, Tisbury at PN6721 – PN6726
[445] Statement of Michael Tisbury (**UFU-14**) at [101]
[446] Statement of Robert Psaila (**UFU-21**) at [123]
[447] Statement of Michael Tisbury (**UFU-14**) at [102]

to the consultative arrangements under the 2010 Operations Agreement. In this case they have lead to a better and safer outcome.

However, this is contradicted by other evidence, including that of Mr McQuade in his reply statement (**MFB-28**) at [65], where he states:

> *I refer to paragraph 132 of Mr Psaila's statement. It is incorrect to say that MFB would have commissioned these appliances without addressing the gap in the ladder. In fact, it was Mr Psaila himself who confirms in paragraphs 91 & 92 of his witness statement that it was the MFB and not the UFU who sought to address the gap in the ladder. It is also incorrect to suggest that a risk assessment would not have occurred if not for the UFU. A risk assessment is part of the process as detailed in the appliance development process manual. Accordingly, the MFB would have identified and addressed the issue regardless of consultation.*

4. Operation of the 2010 Agreement

The effect of clause 88 of the 2010 Agreement in this example meant the UFU effectively exercised a veto power over the MFB's ability to determine the appropriate appliance to be introduced and when.

5. Effect of the issue

Notwithstanding the design fault discussed above (which would, as the evidence established, had been picked up during normal risk assessment process), the effect of this issue was that the requirement to consult and reach agreement with the UFU on all aspects of appliances, has had the effect of limiting the discretion of the MFB to manage its resources as it deems appropriate and necessary in order to discharge its statutory functions. This is so even in circumstances where the MFB had engaged in consultation under the 2005 Agreement. That the MFB is unable to purchase and commission new appliances without the agreement of the UFU, undermines its ability to carry out its statutory functions and management of its own resources.

Appendix S

Introduction of Workplace Behaviour Training Program

1. Outline of issue

In 2011, the MFB sought to introduce a workplace behaviour training program to provide employees with training on workplace respect issues including discrimination, harassment and bullying (**Workplace Behaviour Program**).[448] This training is part of what the MFB considers is necessary to do in order to comply with its statutory obligations to take all reasonable steps to prevent unlawful conduct in the workplace.[449]

Part of the Workplace Behaviour Program was an online training module which the MFB considered to be a cost effective and practical way of delivering the training in question.[450] The Workplace Behaviour Program also contained an assessment component. The UFU lodged a grievance under the Agreements following disagreement about what had been previously agreed in relation to these two aspects of the Workplace Behaviour Program.[451] The MFB did not agree that a grievance could be raised.[452]

The Workplace Behaviour Program has yet to be implemented.[453]

2. Relevant provisions of the 2010 Agreement

***Clause 13 - Consultative process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

Clause 15 - Introduction of change:

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.'*

***Clause 19 – Dispute Resolution,* in particular:**

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

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[448] Statement of Michael Anthony Werle (**MFB-35**) at [79].
[449] Statement of Michael Anthony Werle (**MFB-35**) at [81].
[450] Statement of Michael Anthony Werle (**MFB-35**) at [92].
[451] Statement of Michael Anthony Werle (**MFB-35**) at [122].
[452] Statement of Michael Anthony Werle (**MFB-35**) at [131].
[453] Statement of Michael Anthony Werle (**MFB-35**) at [133].

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Michael Anthony Werle (**MFB-35**) at [79] – [131];
- the reply witness statement of Michael Anthony Werle (**MFB-36**) at [23] – [35]; and
- Transcript PN4699 – Transcript PN4788 (Mr Werle).

The MFB's position is that it has statutory obligations in relation to the conduct of employees and others in its workplace,[454] and that a Gap Analysis developed by the MFB demonstrated that there was a need for training and education in this space.[455] As set out in Mr Werle's witness statement (**MFB-35**) at [81]:

> *The MFB have statutory obligations to take all reasonable steps to prevent unlawful conduct and want to create and maintain a respectful workplace and safe work environment. To do so the MFB must provide the associated policy guidance, education and training to employees in a timely manner. Failure or delay in doing so creates serious liability risks for the MFB and fosters disengagement.*

An online module as part of the Workplace Behaviour Policy formed part of the proposal when the implementation details were put to the Consultative Committee on 6 March 2013.[456] As set out in Mr Werle's witness statement (**MFB-35**) at [91]:

> *Lindsey's First Report recommended that the Consultative Committee endorse the implementation of the HREEO Training and refer consideration of the delivery mode and logistics to the Training Subcommittee with a report back to the Consultative Committee by no later than June 2013. ...*
>
> *A copy of the proposed PowerPoint presentation was attached, which was to 'be translated into an online module delivered as part of the skills maintenance schedule'.*

The MFB's position is that the incorporation of an online module is necessary for efficiency.[457] See Mr Werle's witness statement (**MFB-35**) at [92]:

> *On 28 March 2013, Organisational Development finalised discussions with provider, En Masse, for the development of an online training module. The MFB operates from multiple locations across metropolitan Melbourne. Modern organisations have introduced online training as an effective way of delivering training and education. Delivering face to face training is not always cost effective or practical. Face to face training can be very time consuming and very expensive and could not reasonably be justified for the training in question.*
>
> This position is reflected in the minutes of meetings and at this point the only concerns raised were about the '*the depth of the assessment and the effectiveness at station level*'.[458]

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[454] Statement of Michael Anthony Werle (**MFB-35**) at [81].
[455] Statement of Michael Anthony Werle (**MFB-35**) at [87].
[456] Statement of Michael Werle (**MFB-35**) at [91].
[457] Statement of Michael Werle (**MFB-35**) at [92].
[458] Statement of Michael Werle (**MFB-35**) at [96]-[97].

The UFU's feedback was incorporated into the content of the training and there was no significant change in the MFB's proposal, specifically how the training was to be delivered, over the course of the consultation process.[459] See Mr Werle's reply witness statement (**MFB-36**) at [31]-[32]:

> *The detailed feedback received by the MFB did not include 'concerns with the proposed online delivery' including the assessment component which was included in the training package. If there were lingering concerns, these should have been included in the feedback that was provided.*
>
> *Since providing feedback in December 2013, it was not until the Training Subcommittee meeting on 23 January 2014 that the UFU representatives raised their lack of support for online training and the assessment component.*

The UFU's concerns with the proposed online training method were not raised until 20 November 2013[460] and these concerns were the '*stumbling block to implementation*'.[461]

The MFB's position is that:

- the progress of the Workplace Behaviour Program through the consultation process has taken an inordinate amount of time;[462]
- the MFB has attempted to accommodate the UFU's requests and address its concerns but that the parties were unlikely to reach consensus such that the consultation process has no further work to do on the issue;[463] and
- the UFU could not raise a grievance in the circumstances.[464]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Brendan John Angwin (**UFU-17**) at [94] – [112]; and
- Transcript PN7913-Transcript PN7921 (Mr Angwin).

The UFU's position is that the MFB is responsible for delay in the implementation of the Workplace Behaviour Program.[465]

In relation to the training method, the UFU's position is that there had been a significant change in the MFB's proposal from face to face to training to online training over the course of the consultation process.[466] See Mr Angwin's witness statement (**UFU-17**) at [99]:

> *the MFB had significantly changed the proposal from being face to face training, to proposing that it be done online. Amongst other concerns from the Subcommittee, all*

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[459] Statement of Michael Werle (**MFB-35**) at [113] and reply statement of Michael Werle (**MFB-36**) at [25]-[26].
[460] Statement of Michael Werle (**MFB-35**) at [106]-[107]; Werle at PN4728 and PN4730.
[461] Reply statement of Michael Werle (**MFB-36**) at [35].
[462] Statement of Michael Werle (**MFB-35**) at [138].
[463] Statement of Michael Werle (**MFB-35**) at [131].
[464] Statement of Michael Werle (**MFB-35**) at [123].
[465] Statement of Brendan Angwin (**UFU-17**) at [95], [99], [102], [104].
[466] Statement of Brendan Angwin (**UFU-17**) at [99].

representatives from both the MFB and UFU were concerned with the substantial change in how the training would be undertaken. All representatives expressed concern that online training and content of the course for Human Rights and Workplace Respect Training was inadequate given the importance of the subject matter.

The UFU's position is that the feedback they provided was only in relation to the content of the training and that it was always unhappy with the proposal online delivery. [467]

5. Operation of the 2010 Agreement

The effect of the operation of clause 13 of the 2010 Agreement is that, absent agreement of the UFU on training content and delivery, the MFB was unable to implement the Workplace Behaviour Program.

The disputes procedure in clause 19 of the 2010 Agreement was invoked by the UFU in circumstances where it disagreed with the MFB's rejection of its preferences in terms of training delivery even though consultation had occurred.

6. Effect of the issue

The Workplace Behaviour Policy was introduced to the Consultative Committee in November 2011 and it is still yet to be implemented, which is a significant period of time.[468] The initiative is an important one in order for the MFB to comply with its statutory obligations and ensure the culture of its workplace is one free from discrimination, bullying, harassment and the like.[469]

The effect of clause 19 in circumstances where the UFU refuses to accept implementation methods the MFB considers are most efficient and cost effective, is that the MFB is prevented from implementing programs to assist it to satisfy its statutory obligations.

The delay and the invocation of the status quo means that the employees and their managers have not had the benefit of the training when they could have had it for a period of over two years. This is a bad outcome.

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[467] Statement of Brendan Angwin (**UFU-17**) at [105].
[468] Statement of Michael Werle (**MFB-35**) at [133].
[469] Statement of Michael Werle (**MFB-35**) at [79], [81] and [138].

Appendix T

Dispute regarding transfer of Pumper Tanker to Sunshine North fire station

1. Outline of dispute

In March 2013 an order was made by Assistant Chief Fire Officer Darren Davies for a Pumper Tanker to be moved from Eastern Hill fire station in the CBD to Sunshine North fire station.[470] This order was repeated by the then acting Chief Officer Peter Rau.[471] The placement of a Pumper Tanker at Sunshine was an outcome which firefighters represented by the UFU had been requesting for some time.[472]

Immediately following the order to move the appliance, with no discussion with the MFB, Casey Lee (an industrial officer of the UFU) notified a grievance, stating that there had been no consultation regarding the move and that the move was in breach of the agreement.[473] The status quo was invoked, preventing the MFB from carrying out the transfer.[474] The invocation of the status quo was notified to employees by a UFU bulletin authorised by Peter Marshall.[475]

The MFB applied to the FWC for an order to stop the UFU from preventing the transfer of the Pumper Tanker, on the basis that it constituted industrial action. The outcome of the FWC proceeding was that the UFU agreed to withdraw the grievance, the effect of which was the removal of the status quo and thereby allowing the MFB to complete the transfer of the appliance to Sunshine North fire station.[476]

2. Relevant provisions of the 2010 Agreement

***Clause 19 – Dispute Resolution*, in particular:**

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

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[470] Statement of Darren Davies (**MFB-31**) at [31]
[471] Statement of Darren Davies (**MFB-31**) at [40]
[472] Davies at PN3786
[473] Statement of Darren Davies (**MFB-31**) at [34] and [35]
[474] Ibid
[475] Statement of Darren Davies at [35].
[476] Statement of Davies at [56] – [58].

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Darren Davies (**MFB-31**) at [18] – [64];
- the reply witness statement of Darren Davies (**MFB-32**) at [14] – [18], [26] – [27] and [30] – [34]; and
- Transcript, including at Transcript PN279 – Transcript PN282 (Mr Rau), Transcript PN3780-Transcript PN3843 and Transcript PN3864-Transcript PN3866 (Mr Davies).

The MFB position was that the movement of the Pumper Tanker to Sunshine North fire station was an operational decision which should not have required consultation. The notification of a grievance by the UFU coupled with imposition of the status quo requirement, curtailed the MFB's ability to allocate resources as it considered operationally appropriate. That was unacceptable. As set out in paragraph 44 of Mr Davies' statement (**MFB-31**):

> *A direction authorised by the MFB's Chief Officer was not being complied with due to the UFU ordering employees not to comply. Such a restriction on the MFB's ability to allocate resources in the manner it deems appropriate and necessary for it to meet its statutory obligations, and which affords the requisite protection of members of the public is, and was, in my opinion entirely unacceptable. It represented a direct attack on the legislative authority of the Chief Officer to have and maintain control, at all times, of resources (both human and appliances).*
>
> Further, Mr Davies evidence was that the curtailment of the MFB's ability to control it resources, and the undermining of a direction by its Chief Officer, created a very dangerous situation for the MFB.[477] Davies (**MFB-31)** at [44] said:
>
> *A direction authorised by the MFB's Chief Officer was not being complied with due to the UFU ordering employees not to comply. Such a restriction on the MFB's ability to allocate resources in the manner it deems appropriate and necessary for it to meet its statutory obligations, and which affords the requisite protection of members of the public is, and was, in my opinion entirely unacceptable. It represented a direct attack on the legislative authority of the Chief Officer to have and maintain control, at all times, of resources (both human and applicances).*

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Serge Slaviero (**UFU-40**) at [18] – [33];
- the witness statement of Kenneth Brown (**UFU-6**) at [52] – [63];
- the witness statement of Casey Lee (**UFU-23**) at [213] – [219].
- Transcript, including at Transcript PN6023 – Transcript PN6066 (Mr Brown) and Transcript PN9285 – Transcript PN9313 (Mr Lee).

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[477] See statement of Darren Davies (**MFB-31**) at [43]

According to Mr Lee[478], the grievance was raised because he, or the UFU, believed the MFB was required to consult about the transfer of the appliance to Sunshine North, and it did not do so. Mr Lee's evidence was also that the movement of the appliance could not take place unless the UFU agreed to it being moved.[479] This is despite Mr Lee agreeing that the MFB have both the authority and the responsibility for moving appliances within the MD.[480]

However, the UFU witness evidence goes further, with Mr Brown stating that had he known about the grievance, he would not have supported it. See Brown at Transcript PN6051:

> *You deal, in your statement about 62 and 63 - yes, I think the bulletin that followed at 25 March 2013 says the status quo provisions - I'm happy to hand this to you - 'Advising that there's been no consultation to the relocation which is in breach of the 2010 MFB agreement. We will keep members informed. Status quo applies.' Now, as I understand your evidence, you weren't involved in this matter?*
>
> *---No, I wasn't. I wouldn't have supported it.*

Mr Brown also stated that in fact the firefighters' concerns were related to the burnover protection equipment on the Pumper Tanker which the MFB were attempting to transfer to the station.[481]

However, under cross-examination, Mr Brown admitted that this issue was never raised in correspondence between the MFB and UFU.[482]

Furthermore, in response to questioning by Commissioner Wilson, Mr Brown admitted that he did not discuss this issue at the time, or indeed after the event, with either Mr Davies or then Chief Officer Shane Wright, to whom Mr Brown reported at the time:

> *THE COMMISSIONER: Do you recall when that first became the concern to you?---I can't recall.*
>
> *Was it before or after the notification of the dispute?---It would have been after the notification of the dispute. Because if I'd known prior to that, I would have rang assistant chief fire officer Darren Davies and had a discussion with him, and with my other colleagues as well, and tried to have a meeting with them and explain the process because of my knowledge of western, and I don't expect Mr Davies to have 14 years knowledge of the western suburbs in 12 months. It's just not - - -*
>
> *Even after the grievance was notified, did you discuss that with Mr Davies, your concern?---I wasn't made aware until the appliance went back.*
>
> *Right. But the question I asked you was whether you discussed your concerns with Mr Davies?---No.*
>
> *Who do you report to? Can you remind me of that again, please?---Currently I report to acting deputy chief David Bruce.*
>
> *Was that the same person at the time when this issue arose?---No.*
>
> *So who did you report to at that time?---Chief fire officer Shane Wright.*

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[478] See statement of Casey Lee (**UFU- 23**) at [215], and Lee at PN9292 and PN9297
[479] Lee at PN9311
[480] Lee at PN9288-PN9289
[481] Brown at PN6053-6054, and see statement of Kenneth Brown (**UFU-6**) at [63]
[482] Brown at PN6054

Did you discuss your concerns with him?---No, because the pumper tanker had gone back.

All right. Okay, thank you. Thank you, Mr Parry.[483]

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU were able to use the dispute resolution procedure contained at clause 19 to invoke the status quo to prevent the movement of an appliance by the MFB.

6. Effect of the dispute

The effect of the UFU's ability to use the status quo provision in the 2010 Agreement was that:

(a) the MFB was not able to locate its resources as it had determined was operationally appropriate in circumstances where there was no issue that it had the authority and responsibility to do so;[484]

(b) the MFB had to commence urgent proceedings in the FWC (alleging industrial action) in order for the UFU to agree to withdraw the grievance and advise employees that there was no limitation on the movement of the appliance;[485]

(c) the MFB's ability to manage its statutory obligations and functions under the MFB Act were severely curtailed;[486]

(d) the authority of Assistant Chief Fire Officer Darren Davies acting as a delegate of the Chief Officer was undermined.[487]

The MFB position is that it is a very poor outcome that the provisions in the 2010 Agreement are used by the UFU to 'veto' a decision and use the status quo provision in the dispute resolution clause to prevent the MFB from carrying out an operational decision which has the effect of restricting its ability to carry out its statutory function of providing and ensuring emergency management response in the MD.

The dispute resolution procedure in the 2010 Agreement currently does that, and the UFU have used it to this effect.

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[483] Brown at PN6058 - PN6065
[484] Statement of Darren Davies (**MFB-31**) at [64]
[485] Statement of Darren Davies (**MFB-31**) at [47]
[486] Statement of Darren Davies (**MFB-31**) at [44]
[487] Statement of Darren Davies (**MFB-31**) at [64]

Appendix U

New breathing apparatus and HAZMAT appliances

1. Outline of issue

In March 2009, the MFB identified that its BA and HAZMAT appliances were reaching the end of their service life and needed to be replaced.[488]

Over approximately nine months, the MFB undertook significant consultation with end users outside the consultation framework of the 2005 and 2010 Agreements.[489]

A final set of plans was agreed by the key stakeholders in around September 2010.[490]

Due to a series of delays, including disagreement between the MFB and the UFU in respect of consultation, the appliances were not completed until February 2013.[491]

Both appliances received an award from WorkSafe Victoria. [492]

2. Relevant provisions of the 2010 Agreement

***Clause 13 - Consultative process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus'; and*
>
> *'13.3.5. The respective parties, at their own initiative, may require the endorsement of their constituents in relation to proposals for change. No proposals for change arising from this agreement shall be implemented without referral to the MFB UFU Consultation Committee.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [118] – [154];
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [38], [43] – [45], [48] – [51] and [71] – [76];
- Transcript including at Transcript PN3168 – Transcript PN3181 and Transcript PN3208 – Transcript PN3219 (Mr O'Connell).

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[488] Statement of Andrew O'Connell (MFB -25) at [118].
[489] Statement of Andrew O'Connell (**MFB -25**) at [120] – [126].
[490] Statement of Andrew O'Connell (**MFB -25**) at [126].
[491] Statement of Andrew O'Connell (**MFB -25**) at [150] and [154].
[492] Statement of Andrew O'Connell (**MFB -25**) at [151].

The MFB's position is that the 2010 Agreement created unnecessary inefficiencies and delayed the introduction of important equipment, without any significant benefit arising from those delayed processes under the 2010 Agreement.[493]

> In developing the appliances, the MFB spent considerable time consulting with staff. Commander O'Connell worked closely with the firefighters at South Melbourne Fire Station (Fire Station 38), a station with specialist breathing apparatus and HAZMAT capability, to gather feedback. As Mr O'Connell says at [122] of his statement (MFB-25):
>
> 'The staff at FS38 are extremely experienced in BA and HAZMAT and have attended a large number of incidents where BA is used, such as chemical fires. I knew that the staff could see around some corners that I couldn't. We sat down with every platoon to gather feedback on the project. This happened on a number of occasions, and we continued revising and re-engaging with each of the platoons.'

The MFB also met with key stakeholders, including representatives from Fleet, Operations, Equipment Resource Management, Health and Safety, the HAZMAT department, the CFA and the UFU, to gather feedback and identify opportunities for improvement.[494]

During the development of the appliances, the 2010 Agreement came into force, resulting in a modified consultation framework (i.e. a change from EBIC to the current Consultative Committee). In light of this, the UFU maintained that consultation had not properly occurred under the 2010 Agreement.[495]

The rigidity of the UFU and the consultation process under the 2010 Agreement contributed to the delays associated with commissioning the appliances. For example, at the Consultative Committee meeting on 7 March 2012, the UFU requested that the project be referred to the Training Sub-committee. Inadvertently, this request was not documented in the Consultative Committee minutes of meeting. Mr Lee on behalf of the UFU would not allow a referral to the Training sub-committee without a minuted request from the Consultative Committee, nor would the UFU agree to amend the minutes. As such, the MFB was delayed for four weeks until the next Consultative Committee when the referral to the Training Sub-committee could be minuted.[496]

The project experienced some delays as a result of deadlocked negotiations for the MFB's Corporate and Technical staff agreement. Mr O'Connell suggested various 'workaround' solutions to expedite the commissioning of the appliances. However, the UFU rejected these solutions because the appliances would not be completed in strict accordance with the agreed specifications. Without the agreement of the UFU, the MFB was unable to implement these solutions.[497]

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[493] Statement of Andrew O'Connell (**MFB -25**) at [119].
[494] Statement of Andrew O'Connell (**MFB-25**) at [123].
[495] Statement of Andrew O'Connell (**MFB-25**) [132] and [133].
[496] Statement of Andrew O'Connell (**MFB-25**) at [134] and [135].
[497] Statement of Andrew O'Connell (**MFB-25**) at [145] – [146].

Although the project experienced other delays which were unrelated to the 2010 Agreement, Mr O'Connell estimates that had it not been for the consultation process under the 2010 Agreement, the appliances could have been completed some six months earlier.[498]

The MFB's view is that consultation under the 2010 Agreement added no value to the development of the appliances. Mr O'Connell's evidence is that the high quality of the appliances, which ultimately resulted in both appliances receiving awards from WorkSafe Victoria, was achieved through the extensive end-user consultation which took place outside of the consultation framework in the 2010 Agreement.[499]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Brendan Angwin (**UFU-17**) at [74];
- the witness statement of Christopher Cleary (**UFU-20**) at [53] – [57];
- the witness statement of Dimitra Eirini Sophia Krouskos (**UFU-25**) at [5] to [11];
- the witness statement of Grant O'Connor (**UFU-63**) at [35] – [41];
- the witness statement of Andrew Picker (**UFU-68**) at [4] – [8]; and
- transcript including at Transcript PN9696 – Transcript PN9702.

The UFU position appears to be that consultation had not taken place through the mechanism of the 2010 Agreement. Namely, although the MFB had undertaken significant consultation with the end-users and the modifications to the appliances had received sign-off from the end users, the UFU's complaint was that there had been insufficient consultation through EBIC and the Consultative Committee.[500]

As Ms Krouskos says at [8] (**UFU-25**):

> '*Simply because* (Mr O'Connell) *had had internal discussions at the internal MFB level, none had occurred with the consultative committee in accordance with the agreed process.*'

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the UFU was able to delay the commissioning of the new breathing apparatus and HAZMAT appliances through insistence on consultation through the framework in the 2010 Agreement. Further, absent the agreement of the UFU to 'workarounds' in relation to delays, the MFB was unable to proceed with the development of the appliances.

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[498] Statement of Andrew O'Connell (**MFB-25**) at [154].
[499] Statement of Andrew O'Connell (**MFB-25**) at [151].
[500] Statement of Christopher Cleary (**UFU-20**) at [53] – [57] and statement of Dimitra Krouskos (**UFU-25**) at [6] – [9].

6. Effect of the issue

The delays and indeed the consultation requirements under the 2010 Agreement were of no benefit to the MFB, the equipment or firefighters in this instance.

As Mr O'Connell says at [151] of his statement (**MFB-25**):

> '*Nothing that occurred through the consultation process under the 2010 Operational Agreement had any relevance to the design or construction of the appliances. All relevant issues in this regard were raised through the end user discussions prior to commencement of consultation as required by the 2010 Operational Agreement.*'

The consultation and work both before and outside of the 2010 Agreement contributed to the appliances being given an award from WorkSafe Victoria.

As a result of the requirements of the 2010 Agreement, the MFB was delayed by approximately six months in commissioning the new breathing apparatus and HAZMAT appliances.[501] That is a poor outcome for the firefighters, MFB and the community.

[501] See statement of Andrew O'Connell (**MFB-25**) at [154].

Appendix V

Dispute regarding Windows 7

1. Outline of dispute

In April/May 2012, the MFB proposed to upgrade its computer software on all computers from Windows XP to Windows 7.[502] The update was required because Microsoft was phasing out support to Windows XP which would mean that the MFB would no longer receive automatic updates to the software, exposing the systems to security risks and viruses.[503]

The MFB consulted on the upgrade from Windows XP to Windows 7 at both the Consultative Committee and the Training Sub-Committee, and after 7 months of consultation proposed to implement the update.[504] The UFU immediately raised a grievance, invoking the status quo.[505] The MFB sought to resolve the grievance and met with the UFU.[506] The MFB sought further information from the UFU on the MFB's proposal but the UFU did not respond.[507] The MFB implemented the upgrade on 4 April 2014, one year after consultation had originally commenced.[508]

2. Relevant provisions of the 2010 Agreement

Clause 15 – Introduction of Change:

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 still apply.'*

***Clause 13 – Consultative Process*, in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 19 – Dispute Resolution*, in particular:**

> *'19.4. While the above* [dispute resolution] *procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

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[502] Statement of Craig Lloyd (**MFB-17**) at [86] and [90]
[503] Statement of Craig Lloyd (**MFB-17**) at [87] and Lloyd at PN2009-2011
[504] Statement of Craig Lloyd (**MFB-17**) at [90] – [93] and [110] and Lloyd at PN2046
[505] Statement of Craig Lloyd (**MFB-17**) at [111]
[506] Statement of Craig Lloyd (**MFB-17**) at [114]
[507] Statement of Craig Lloyd (**MFB-17**) at [116] – [117]
[508] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2114 – PN2115

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Craig Lloyd (**MFB-17**) at [86] – [129];
- the witness statement of David Bruce (**MFB-22**) at [38] – [42];
- Transcript, including at Transcript PN2009 – Transcript PN2115, Transcript PN2164 – Transcript PN2172 (Mr Lloyd) and Transcript PN2948 – Transcript PN 2952 (Mr Bruce).

The MFB's position was that the upgrade of its operating system software from Windows XP to Windows 7 was not a matter it was required to consult upon under the 2010 Agreement, but that it made the decision to consult with the union regardless of this.[509] The MFB considered that the upgrade was a routine software update in line with ordinary technological advances, that the two operating systems are very similar and that there was no effect on the use of the system by operational staff – all core programmes used by the staff were accessed and used in exactly the same way.[510]

Regarding training for the software upgrade, the MFB originally proposed that training be by way of a 'skills refresh', to be given by five outside trainers.[511] However, the MFB position was that in reality, across the board face-to-face training on the software upgrade was not needed and that the online Windows training and training accessible from the desktop which the MFB offered and provided was sufficient.[512] This assessment was based on Mr Lloyd's extensive discussions with colleagues, including with senior operational staff, as well as discussions with other agencies.[513] This included the CFA, which had implemented the upgrade with no problems and provided no training at all.[514] As stated by Mr Bruce in his statement (**MFB-22**) at [41]:

My view is that members of the community don't normally get face to face training on Windows 7 and it is rolled out across organisations everywhere without incident.

The MFB position was further that, if there were any problems, all staff had 24 hour access to an IT help-desk.[515] This was agreed by Mr Angwin for the UFU under cross examination by Mr Wheelahan.[516]

The MFB, regardless, sought to consult with the UFU to seek an agreed model for face-to-face training[517] but agreement between the parties could not be reached.[518] As set out at Transcript PN2089 – Transcript PN2093 (Mr Lloyd):

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[509] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2169-PN2170
[510] Statement of Craig Lloyd (**MFB-17**) at [112], [123] and [129] and Lloyd at PN2011-PN2015
[511] Statement of Craig Lloyd (**MFB-17**) at [90] and [91]
[512] Statement of Craig Lloyd (**MFB-17**) at [119] and [124], statement of David Bruce (**MFB-22**) at [41], and Lloyd at PN2019, and at PN2028-2030
[513] Lloyd at PN2020-PN2022
[514] Statement of Craig Lloyd (**MFB-17**) at [124] and Lloyd at PN2020
[515] Statement of Craig Lloyd (**MFB-17**) at [126] and Lloyd at PN1794
[516] Angwin at PN7880
[517] Statement of Craig Lloyd (**MFB-17**) at [126] and Lloyd at PN1794, and PN2089 – PN2093

You say that you couldn't reach a compromise with the union on the basis that there be a combination of operational staff and non-operational staff undertaking the training?---That's correct.

It was operational staff or bust so far as the union was concerned?---That was the position that was being made clear.

Is that your evidence?---Yes.

You thought that was unreasonable?---Yes, I did.

The MFB did not agree with the UFU that the training for operational staff on Windows 7 needed to be provided by operational staff, as required by the UFU.[519]

On the basis that agreement could not be reached with the union, and on the basis that the MFB considered in any case that the matter was not one which it was required to consult upon,[520] the MFB sought to implement the upgrade but the UFU raised a grievance under the dispute resolution process.[521]

The MFB then met with the UFU to seek to resolve the grievance[522] and sought further feedback from the UFU on the MFB's proposal.[523] The UFU did not respond.[524]

The MFB implemented the upgrade from Windows XP to Windows 7 in April 2013, one year after consultation had originally commenced.[525] The MFB considered that this should have been a straightforward process, but ended up being protracted and taking over 12 months.[526] Even Mr Angwin, under cross examination by Mr Wheelahan stated at Transcript PN7912:

Do you accept, through your involvement in the Windows 7 upgrade, that it was delayed for a long period of time?--- It took a long time to go through negotiations. Correct.

The MFB position was that the actual implementation went smoothly.[527] Under cross examination, Mr Lloyd stated that he was not aware of the two emails set out in the statement of Ms Krouskos (**UFU-25**) which complain about the introduction of Windows 7 and the corresponding necessary upgrade to Office 2010.[528] Indeed, the emails are not appended to the statement of Ms Krouskos, and the extracts in her statement (**UFU-25**) at [43] do not include any details of when the emails were sent or to whom.

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

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[518] Statement of Craig Lloyd (**MFB-17**) at [109] and Lloyd at PN2069
[519] Statement of Craig Lloyd (**MFB-17**) at [109] and Bruce at PN2950 – PN2956
[520] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2169-PN2170
[521] Statement of Craig Lloyd (**MFB-17**) at [109] – [111] and Lloyd at PN1794
[522] Statement of Craig Lloyd (**MFB-17**) at [114]
[523] Statement of Craig Lloyd (**MFB-17**) at [116]
[524] Statement of Craig Lloyd (**MFB-17**) at [117]
[525] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2114 – PN2115
[526] Statement of Craig Lloyd (**MFB-17**) at [126]
[527] Statement of Craig Lloyd (**MFB-17**) at [126]
[528] Lloyd at PN2015

- the witness statement of Rini Krouskos (**UFU-25**) at [16] – [46];
- the witness statement of Brendan Angwin (**UFU-17**) at [75] – [82] and [85] – [88];
- Transcript, including at Transcript PN7571 – Transcript PN7573 (Mr Hamilton) and Transcript PN7875 – Transcript PN7912 (Mr Angwin).

The UFU position was that the MFB was required to consult with the UFU within the consultative process under the 2010 Agreement.[529] The UFU position was that training was required for all operational staff on Windows 7, and that this should be provided only by operational staff.[530] The UFU also believed that the issue related to the non-contracting out clause in the 2010 Agreement.[531]

5. Operation of the 2010 Agreement

The 2010 Agreement operates to require the MFB to consult with the UFU, and reach agreement on, any proposal which constitutes 'change in matters pertaining to the employment relationship'.[532]

The dispute resolution process at clause 19 permits the UFU to initiate a grievance and prevent that change from happening if it considers that consultation has not occurred or that insufficient consultation has occurred, regardless of the reason for the grievance.

6. Effect of the dispute

The effect of the dispute, and the UFU's ability to use the status quo provisions in the dispute resolution process, was that:

(a) the MFB sought to undertake consultation with the UFU, even though it considered it was not required to under the 2010 Agreement;[533]

(b) the UFU initiated a grievance when the MFB sought to implement the upgrade to Windows 7 after seven months of consultation with no agreement reached;[534]

(c) it took more than 12 months to implement a simple software update.[535]

The MFB position is that the requirement to consult and reach agreement with the UFU on all matters pertaining to the employment relationship in the broad manner that is currently required under the 2010 Agreement, stifles any change it may determine is appropriate. This example

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[529] Statement of Rini Krouskos (**UFU-25**) at [36]
[530] Statement of Rini Krouskos (**UFU-25**) at [33] and [35]
[531] Statement of Rini Krouskos (**UFU-25**) at [34]
[532] Clause 15 of the 2010 Agreement
[533] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2169-PN2170
[534] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2169-PN2170; Statement of Craig Lloyd (**MFB-17**) at [109] – [111] and Lloyd at PN1794
[535] Statement of Craig Lloyd (**MFB-17**) at [118] and Lloyd at PN2114 – PN2115; Statement of Craig Lloyd (**MFB-17**) at [126]

shows that the MFB was unable to implement in a timely manner what in reality was a straightforward and necessary software update to its computer systems..

As set out in Mr Lloyd's witness statement at [129]:

> *As a result of the 2010 Agreement, what should have been a straightforward decision to routinely update a new computer operating system, in line with ordinary technological advances, ended up being a protracted process that took over twelve months.*

Appendix W

Deployment and entitlements at the Hazelwood mine fire

1. Outline of issue

The reform program coming out the Victorian Bushfires Royal Commission 2009 and led by the Fire Services Commissioner Victoria means that the MFB is now required to play a significant part in building a combined capacity and capability as a unified state resource. This new approach was tested by the Hazelwood mine fires.[536]

The Hazelwood mine fires in Morwell started on 9 February 2014 and burned for approximately 50 days.[537] During the fires the MFB had a number of concerns about the impact that the 2010 Operational Agreement had on the MFB's ability to fully and responsibly discharge its mandate.[538]

2. Relevant provisions of the 2010 Agreement

Clause 85 – Emergency response outside Metropolitan Fire District, in particular:

> *'85.10 The parties agree to review the conditions relating to deployment outside the MFD.'*

***Clause 88 – Uniforms and Equipment,* in particular:**

> *88.1 The MFESB and the UFU must agree on all aspects of the:*
> ...
> *88.1.2. equipment,...*
> ...
> *to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.*

Clause 15 – Introduction of Change

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 still apply.'*

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

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[536] Statement of Peter Rau (**MFB-7**) at [27] and [47]
[537] Statement of Peter Rau (**MFB-7**) at [49]
[538] Statement of Peter Rau (**MFB-7**) at [50]

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Peter Rau (**MFB-7**) at [44] – [58];
- the reply statement of Peter Rau (**MFB-8**) at [96] and [99];
- the witness statement of David Bruce (**MFB-22**) at [12] – [30];
- the reply statement of David Bruce (**MFB-23**) at [5] – [6]
- the witness statement of Adam Dalrymple (**MFB-20**) at [39] – [48];
- the witness statement of David Youssef (**MFB-14**) at [187] – [195]; and

Transcript, including at Transcript PN202-Transcript PN205, Transcript PN504-Transcript PN527, Transcript PN548-Transcript PN614 and Transcript PN685-Transcript PN686 (Mr Rau); Transcript PN1163, Transcript PN1172-Transcript PN1175, Transcript PN1561-Transcript PN1575, Transcript PN1315-Transcript PN1332 (Mr Youssef); Transcript PN2765-Transcript PN2779 (Mr Dalrymple); Transcript PN2840-Transcript PN2852, Transcript PN2868-Transcript PN2929, and Transcript PN3003-3006 (Mr Bruce) and Transcript PN6439 – 6461 (Mr Tisbury).

During the Hazelwood mine fires, the MFB was diverted from its core duties by the need to negotiate with the UFU the terms and conditions of deployment for firefighters attending the fires in Hazelwood, including entitlements and rostering.[539] As at [22] of the statement of David Bruce (**MFB-22**):

> *Everything is a negotiation. Any variation to any aspect of their duties we need to agree on with the UFU because of the provisions in clause 85.*

This was said to be a dangerous area to be in when trying to manage an immediate emergency situation.[540] Under cross examination by Mr Parry QC, Kenneth Brown for the UFU agreed to the MFB position (Transcript PN6070 – Transcript PN6073):

> *Well, do you accept the evidence of Mr Bruce that - I read from paragraph 15 of his statement, 'Any time the MFB wanted to do anything in relation to Hazelwood which may have impacted on terms and conditions, we had to consult'?---I accept that. That's terms and conditions, not on operational decisions.*
>
> *I understand that. Terms and conditions included things like rostering?---Yes.*
>
> *You say decisions were being made quickly and on the spot in order not to delay the implementing of the decisions the MFB were seeking. So the MFB were, can I say, seeking to make decisions in the best interests of addressing the meeting of their operational needs, but within that they had to consult with you, as you would have it. You had to make a decision, and agree or not agree as to what they wanted to do?---It was a collaborative approach. It wasn't - - -*

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[539] For example, statement of Peter Rau (**MFB-7**) at [50] and [51], statement of David Bruce (**MFB-22**) at [19] and [20], statement of Adam Dalrymple (**MFB-20**) at [47]

[540] See for example, statement of David Bruce (**MFB-22**) at [20]; statement of Peter Rau (**MFB-7**) at [57]

I understand you say it was collaborative, but you think that's a good state of affairs, having that sort of process going on at a big event? Do you accept - - -?

---It's not ideal.

The requirement under the 2010 Agreement to obtain the agreement of the UFU throughout the Hazelwood deployment led to a situation where the UFU could exercise its veto right, and in fact made threats to pull firefighters out of Hazelwood unless something was resolved to its satisfaction.[541] Some of these difficulties may have been alleviated had the MFB been able to reach agreement with the UFU on a new work instruction for surge events – OWI019. However, the failure to reach agreement had persisted for the past two fire seasons.[542]

Furthermore, the fires at Hazelwood highlighted to senior management that firefighters often take concerns or issues to the UFU in the first instance, rather than taking them directly to the MFB up the chain of command.[543] Taking issues straight to the UFU rather than through the chain of command is borne out of the model under the 2010 Agreement where UFU agreement is needed to matters, which creates a culture where if employees have a query they go to the UFU first. This model serves the MFB very poorly[544] and, as stated by Mr Youssef at Transcript PN1574, it '*has the potential to undermine both efficiency and safety and that concerns me greatly.*'

Mr Youssef discussed this in answers to questions from Commissioner Wilson on this topic, at Transcript PN1570-Transcript PN1575:

THE COMMISSIONER: Mr Borenstein, before you do, can I just ask a few questions, please, about that topic.

Mr Youssef, you just a second ago said that firefighters were providing information directly to the union - - -?---That's right.

- - - when they should have been providing it to your hierarchy. Are you saying from that that you just were not getting that information through your hierarchy?

---That's right. In some cases I believe that was the case, and the conduit was via Peter Marshall. In some cases I know that he was sending text messages to the chiefs with information that wasn't apparent to us at the incident or at the regional control centre.

Was that something then taken up with the people concerned? Did you have it taken up with them to say, 'Well, why didn't provide this to me? You should have'?---That was something that may have been managed at - well, in terms of the people concerned, Commissioner, we might have had 50 or 100 firefighters rotating through that fire. There was continual shift changes and it was often very difficult. It was a very challenging event, but it was very difficult then to unravel things and actually try and find out, well, where that information would have been provided to in an ideal world. As I said, it was a different event and it was quite different to what had happened previously. So in the end it was important the information was passed through. I just would have much rather that it was passed through immediately via the chain of command rather

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[541] For example, statement of Peter Rau (**MFB-7**) at [55] and [57] and Rau at PN592-PN593

[542] Statement of Adam Dalrymple (**MFB-20**) at [36], [47], statement of David Youssef (**MFB-14**) at [187] – [188], and Dalrymple at PN2769 and PN2778

[543] For example, statement of Peter Rau (**MFB-7**) at [53], Bruce at PN2870 and PN2880, Youssef at PN1563

[544] For example, statement of Peter Rau (**MFB-7**) at [53]

than coming back via the fire commissioner or via the fire chiefs. It was almost like this reverse reporting arrangement which was not envisaged in our procedures.

So to what extent would that feature be frustrating versus it being destructive?

---Frustrating. Yes, it could be frustrating. I'm not so worried about frustration, I'm more worried about safety of our firefighters and anything that would undermine the effective operation of an incident, and those sorts of things, anything that interferes with the normal chain of command has the potential to undermine both efficiency and safety and that concerns me greatly.

Okay, thank you.

The MFB train its firefighters to take issues through the chain of command and tell them to do so; the MFB say that it is the responsibility of each and every officer to ensure that happens.[545]

The cross examination of Mr Tisbury about the Hazelwood deployment only highlighted the negative outcomes arising from the requirements of the 2010 Agreement for agreement between the parties before any new equipment, such as a GPS device on appliance, could be implemented. The delay in implementation of such devices, like the delay in PPC in the 2000s, has obvious health and safety impacts. Relevantly, at Transcript PN6439 to 6461 Mr Tisbury, a BCOM member, was questioned as follows:

Another obvious difficulty down at Hazelwood - presumably, it's a huge, open cut mine, and little landmarks to note. So, even if you were on the same radio, and you were in a bit of trouble, it would be very hard to identify where you were?

---We had maps in the mine, for the mine. The mine itself was sectorised, and the instructions - because we had no local knowledge, and the majority of CFA firefighters had no local knowledge, there was an instruction given that the mine's workers would escort our crews down, in, and out of the hole. It became especially important at night-time to do that, because visibility was reduced even more, and they have the expertise, they had the local knowledge. They would get the geotech up, they knew which parts were unstable. They knew - it was their backyard, so they knew the place like the back of their hand.

They might have known it by the back of their hand, but if it's dark, with low visibility, when you get into a bit of strife, wouldn't there be difficulty reporting where, in fact, you were in the mine, to get help?---Yes.

That's a serious matter?---Yes.

Very.unsafe?---Yes.

Presumably, it's something that could easily be averted, if each appliance had a GPS tracking device on it? I note you pause, you disagree?---No, no, I agree.

You do agree? Okay, so it would be important - much evidence, and no one disputes the dangerous activities involved in firefighting, that a GPS device attached to trucks is fundamental for safe firefighting in those circumstances?

---Oh, it's certainly advantageous, yes.

Well, it's not only advantageous. You're in a mine, dark, low-visibility. It's a fairly fundamental, simple device, isn't it, to have attached to an appliance?---If it works, yes.

If it works. All right?---Obviously, you want to test it, to ensure that it does work. You'd want to have the confidence (indistinct) work.

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[545] Bruce at PN2880-PN2885 and PN3005

If you're running a brigade, given the importance of that device, you'd think that that's something that management would want to make a decision to install?

---Yes.

Yes, and not only install it, but do it swiftly. Correct?---Yes.

The fact is though, you know, that under your enterprise agreement, a GPS device would constitute new equipment, wouldn't it?---Yes.

You're well-aware that clause 88 of your enterprise agreement requires that the UFU must agree with the MFB on all aspects of equipment, correct?---Yes, correct.

That includes a simple GPS device, correct?---Correct.

So, albeit that that technology has been around for, what, possibly a decade, or more? Correct?---Correct.

The MFB cannot install that simple equipment unless your unit agrees?---Correct.

Whilst it waits for that agreement, on your evidence, that's a very unsatisfactory and unsafe state of affairs in the very circumstance as you've just described it, Hazelwood, isn't it?---Correct.

You also accept that if that requirement to reach agreement didn't exist, the chief officer of the fire brigade would actually be able to make a decision to implement GPS devices?---What he decided was appropriate for firefighter risking our life. I think firefighters want to have a say in the equipment they use when they're risking their lives.

That's not the question though?---The chief firefighter signed the agreement in 2010.

That's also not the question?---Sorry, what was the question?

I know you're advocating for your position but if you just go back to the question: clause 88 did not agree - if agreement was not required with the UFU, the brigade, the chief officer would be able to have installed that very simple GPS device on appliances, couldn't he?---Yes.

Under your current agreement, if the brigade attempted to do that and the United Firefighters Union disagreed, they could file a grievance?---Yes.

Then status quo applies. Correct?---Correct.

The effect of that is it can't be implemented. Correct?---Correct.

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Ken Brown (**UFU-6**) at [64] – [68];
- the witness statement of Michael Tisbury (**UFU-14**) at [66] – [95];
- the witness statement of Andrew Picker (**UFU-68**) at [13]-[18]; and
- Transcript including at Transcript PN5627-Transcript PN5628, Transcript PN5740-Transcript PN5741, Transcript PN5931-Transcript PN5935 and Transcript PN6067-Transcript PN6081 (Mr Brown); Transcript PN6167-Transcript PN6280. Transcript PN6387-Transcript PN6454, Transcript PN7035-Transcript PN7048 and Transcript PN7071-Transcript PN7084 (Mr Tisbury); Transcript PN9968-Transcript PN9992 (Ms Krouskos).

The opinion of UFU witnesses was that the UFU's dealings with the MFB during the Hazelwood fire were positive and constructive,[546] and that it was an exercise in co-operation between the MFB and the CFA, as well as the MFB and its firefighters, with the support of the UFU.[547]

The UFU agreed that not only did the MFB have to consult with the MFB whenever the MFB wanted to do anything which could impact on terms and conditions,[548] but further, that this position was 'not ideal.'[549]

Regarding the issue of matters being raised with the UFU rather than through the chain of command, the UFU position was that the MFB should require its firefighters to go through the chain of command.[550] As set out above, the MFB trains its firefighters to do this.[551]

The UFU's evidence about the Hazelwood fires was also confused regarding the status of the incident as being one which was managed under the Fire Services Reform Action Plan incorporated into the *Fire Services Commissioner Act 2010*, and which contemplates the Fire Services Commissioner having overall control for emergency response[552] as evidenced by the answers of Mr Tisbury under cross examination by Mr Wheelahan, at Transcript PN6189-Transcript PN6198.

5. Operation of the 2010 Agreement

The effect of the 2010 Agreement in this example is that the requirements to reach agreement with the UFU on all matters, including operational matters such as rostering and entitlements, seriously diverted the MFB from its key responsibilities under legislation to manage the Hazelwood fires. Further, the requirement under clause 88 to reach agreement on any new equipment is illustrated by the absence of GPS devices on the appliances used at Hazelwood, because the MFB could not install such devices without UFU agreement. That agreement had been delayed because of a UFU concern about the use of the data for disciplinary purposes.[553] However, Mr Tisbury conceded that had GPS devices been installed on the appliance it would have made it much safer.

6. Effect of the dispute

The effect of the 2010 Agreement at the Hazelwood fires was that:

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[546] Statement of Michael Tisbury (**UFU-14**) at [69] and, for example, Brown at PN5628 and PN5932
[547] Statement of Michael Tisbury (**UFU-14**) at [95]
[548] For example, statement of Kenneth Brown (**UFU-6**) at [64] and Brown at PN6070-6073
[549] Brown at PN6070-6073
[550] For example, statement of Michael Tisbury (**UFU-14**) at [67]
[551] Bruce at PN2880-PN2885 and PN3005
[552] Section 10 of the *Fire Services Commissioner Act 2010*, which was in force at the time of the Hazelwood fires
[553] Ms Krouskos at PN9898 to PN9928.

(a) The MFB was unable to deploy resources as it considered appropriate and necessary to the fires;[554]

(b) Whilst seeking to carry out its functions the MFB was seriously distracted by the requirement to consult with the UFU regarding matters such as rostering and entitlements, until those matters were resolved to the UFU's satisfaction. This was said to be a dangerous situation to be in.;[555]

(c) The requirement to seek agreement of the UFU on all matters creates a culture where firefighters raise issues with the UFU first, rather than utilising the chain of command. This is a serious issue which has the ability to undermine the efficiency and safety of the operation of an incident.[556]

(d) An example of the agreement delaying the efficient implementation of obvious safety equipment for firefighters – i.e. GPS on appliances.

As stated by Mr Rau in his reply statement (**MFB-8**) at [95] and [99]:

> *My view is that deployments, whether inside or outside the MD, should not be subject to consultation under an enterprise agreement. For the reasons set out below, the 2010 Operational Agreement can be used to require consultation on such deployments. This means the authority of the Chief Officer to manage its resources is fettered when it should not be.*
>
> *...the combination of the open-ended nature of clause 85 – Emergency Response Outside the Metropolitan District (namely that, although it sets out the entitlements to apply to such deployments, it also provides for review of those entitlements) and the ability of the UFU to use the status quo provisions to interfere with the MFB's management of its organisation, means that the MFB are forced into 'consulting' with the UFU about such matters in a manner and time-frame which the UFU dictates.*

The 2010 Agreement permits the UFU to interfere with the MFB's management of incidents which, in the Hazelwood mine fires, undermined the efficiency and potential safety of the incident. [557]

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[554] Reply statement of Peter Rau (MFB-8) at [95] – [99]

[555] For example, statement of Peter Rau (**MFB-7**) at [50] – [51] and [57, statement of David Bruce (**MFB-22**) at [19] and [20], statement of Adam Dalrymple (**MFB-20**) at [47]

[556] For example, Youssef at PN1570-PN1575

[557] For example, Youssef at PN1570-PN1575, statement of David Bruce (**MFB-22**) at [20]; statement of Peter Rau (**MFB-7**) at [57]

Appendix X

Issues regarding updating JSOPs

1. Outline of issue

Following the Victorian Bushfires Royal Commission 2009 the Fire Services Commissioner implemented a range of changes including implementation of revised procedures and practices to ensure that bushfires and other emergencies can be effectively managed by the emergency services in Victoria.[558]

These procedures include the joint standard operating procedures (JSOPS) which detail the resourcing of incident control centres at local, regional and state level.[559]

The MFB needs to update its own operating procedures and practices to align them with State-wide JSOPs. A misalignment will undermine the MFB's service delivery.[560]

Due to the difficulties of consultation under the 2010 Agreements, the MFB has serious concerns about its ability to achieve this.[561]

2. Relevant provisions of the 2010 Agreement

Clause 15 – Introduction of Change

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 still apply.'*

Clause 13 – Consultative Process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of David Youssef (**MFB-14**) at [35] – [44];
- the reply witness statement of David Youssef (**MFB-15**) at [11] – [12]; and
- Transcript PN1315-1332 and Transcript PN1365-Transcript PN1414 (Mr Youssef).

The MFB and the UFU have agreed to and implemented new JSOPs.[562] However, there remains a 'mammoth' amount of work to do to modify all the supporting documents including

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[558] Statement of David Youssef (**MFB-14**) at [35] – [36]
[559] Statement of David Youssef (**MFB-14**) at [38]
[560] Statement of David Youssef (**MFB-14**) at [39]
[561] Statement of David Youssef (**MFB-14**) at [40] – [43] and reply statement of David Youssef (**MFB-15**) at [11]

operational work instructions, of which there are approximately 100,[563] and training manuals. [564] This has not been done and has not yet commenced.[565] As stated by David Youssef under cross examination at Transcript PN1331:

> *...there's a lot of work that needs to be done in the future, and this is why - part of the reasons I'm here is because I can't see, as I've said in my witness statement, how we can possibly bring about the mammoth change that we need to bring about in the operation of the MFB to align with the new state arrangements to provide better services to the people of Victoria under this agreement. Now, we've had other issues with regard to promotional courses where we've tried to put our commanders onto incident management training and the union has not been happy with us doing that, as well to align with state arrangements and we haven't been able to achieve that, where they have actually stopped training previously. So my frustration here is - and it's a very real frustration, that as a deputy chief officer who sits at the state control centre as the state agency commander commanding the MFB trying to get maximum value out of our resources for the people of Victoria, the change that we need to bring about to align every procedure, training and work instruction is mammoth, because we have the complexities of the Department of Primary Industries and Environment and also of the Country Fire Authority. We need to bring all those procedures together so that align completely. The MFB in the past has operated as an autonomous service quite reasonably prior to Black Saturday. That is no longer the environment in which we operate in. We need to bring about a significant shift and I don't know given this current agreement and our need to get agreement with the union, how we can align those procedures, the numerous numbers of procedures and training to bring about the seamless service delivery that Victoria needs.*

The MFB considers that under the current 2010 Agreement it will be an extremely onerous process to update all necessary work instructions and training manuals, and that the process itself will undermine the efficiency and productivity of the MFB.[566] As stated by Mr Youssef (**MFB-14**) in his witness statement regarding the consultation process in relation to these documents:

> *The process of consultation is onerous on the organisation both in terms of senior staff involvement, preparation of documentation, external services and time. The cost to the organisation is unacceptable; in effect the current consultation diverts critical brigade resources from organisation preparedness to non-value adding activities.*
>
> *It is my view that this situation is untenable and not in the community's interest. The existing Agreements and consultation arrangements were formulated in a period when the MFB operated as a largely autonomous organisation. The future for the MFB is as a joined up partner in service delivery with a number of agencies operating to common procedures, systems and practices.567*

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[562] Youssef at PN1320
[563] Youssef at PN1331
[564] Youssef at PN1331
[565] Youssef at PN1320 and PN1327 and PN1372
[566] Statement of David Youssef (**MFB-14**) at [41]
[567] Statement of David Youssef (**MFB-14**) at [40] and [42]

And further at Transcript PN1332:

> *This agreement causes me and others to have to do a huge amount of work to try and get agreement from the union so that we can run the fire brigade. It is onerous and it actually undermines us in the running of the service.*

This is an untenable position.[568]

It is also a position which has already resulted in the MFB operating under the new JSOPs, as it is required to do so, and transferring control of an incident e.g. in the case of the Thomastown grass fire referred to by Mr Youssef, to a central incident control centre in circumstances where the great majority of the MFB workforce would not have understood what was happening.[569] As stated by Mr Youssef under cross examination at Transcript PN1370:

> *Getting back to the issue of transfer of control, I am required under state arrangements, under certain circumstances due to, at that stage, the Fire Service Commissioner's legislation to transfer control when its in the interests of the safety of the Victorian community. With that Fire Commissioner, we had a series of fires which had been lit by, we believe, an arsonist along the Hume Freeway from Craigieburn down to Thomastown, and that meant that there quite a significant drain on both the resources of the Country Fire Authority, MFB and DEPI. In order to - the JSOPs envisaged these sorts of events where we have complexity of the fire, and in some circumstances it's appropriate that an (indistinct) control centre be utilised to manage what is a complex arrangement where resources need to be appropriately balanced between different competing priorities. With these fires, there were properties that were potentially coming under threat over a very long range of the Hume Freeway, and therefore it was - it was in the interests of the community for me to transfer control to the Gisborne ICC, and we did that and we that effectively. If I had have not done that purely because the control unit operators did not understand what I was doing, that may well have put lives at risk. These are the lessons that we learned from the bushfire royal commission, that we need to operate in a joined up way. This is why I'm here, because this agreement is an impediment to us being able to bring about the change we need to bring about to operate in a way that was envisaged after the (indistinct) of the royal commission.*

The MFB could not at this fire have failed to transfer controls to the central incident command centre because the MFB has not been able to change its procedures.[570] When questioned about the safety implications of transferring control when MFB firefighters had not been trained in relation to the procedures, Mr Youssef at Transcript PN1376-Transcript PN1380 stated as follows:

> *Now, do you agree with me that absent those subsidiary processes, to simply go along and apply the JSOPs when people don't know how they're supposed to work in a fire situation creates a danger?---It's highly undesirable to be in that situation - - -*
>
> *Does it create a danger?---No. Look, it potentially could, and that's the problem with the agreement. It potentially could.*
>
> *Well, just lets focus on whether it does or doesn't create a danger?---Potentially.*
>
> *Okay. So when you did this, when you transferred control, did you knowingly put the people under you in a position of potential danger?---No. When transferring control, I*

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[568] Statement of David Youssef (**MFB-14**) at [42]
[569] Youssef at PN1319
[570] Youssef at PN1371

actually improved their situation in terms of knowing that the management of the complex of fires would be managed in a cohesive way, and that the resources then could be properly coordinated by the Gisborne incident control centre, and that the MFB would have called on the resources of Country Fire Authority and DEPI, which I did call on those resources and they were made available to me, and being able to call on those resources actually safeguarded both the community and our own firefighters.

So the lack of the procedures that you've been telling us about had no practical effect in terms of the management of the Thomastown fire?---No, that's not correct, because what I've said to you is that in my role in the control unit in transitioning control and changing my role from incident controller to the divisional commander, I had to take time to explain to the control unit staff what was occurring, because they hadn't had the benefit of having the procedures updated or training. So it actually made my job more complex. I was able to achieve it, but it was an undesirable situation, and as I said in my evidence yesterday, I am concerned because there are many procedures which need to be updated, and training packages which need to be updated to bring MFB into line with state arrangements. There is a great deal of work yet to be done.

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Kenneth Brown (**UFU-6**) at [72] – [73]; and
- Transcript PN5325-Transcript PN5330 (Mr Walker) and Transcript PN5446-Transcript PN5453 (Mr Brown).

The UFU written evidence regarding the MFB's concerns about being able to bring about the necessary changes in relation to the JSOPs under the current consultative arrangements consists of two paragraphs in the witness statement of Mr Brown (UFU-6) at [72] and [73] as follows:

...I am not aware of any impediment caused by UFU or the Agreement consultation provisions to the effective application of JASOPs.

I refer to paragraph 43 of Mr. Youssef's statement. The MFB is moving to a new national training framework (PUA 12). This is a major step towards a national training framework that would facilitate Australia wide interoperability. The UFU supports this development and has sought to progress the initiative. The MFB has continued to deliver major training packages to its employees since the Agreement came into operation. The MFB Registered Training Organisation recently underwent a very satisfactory audit of its operations.

Under examination by Mr Borenstein QC, Mr Brown repeated his evidence as follows:

Can I ask you whether, to your observation, there have been any difficulties in operating under the JSOPs as a result of obligations to consult and agree under the MFB agreement?---I have no I knowledge of any issues that have arisen out of the JSOPs. I've used them extensively over the last four summer fire seasons, and I don't have any issue with them.

The UFU evidence does not otherwise address the MFB's concerns raised in evidence regarding this matter.

5. Operation of the 2010 Agreement

The 2010 Agreement requires the MFB to consult upon and agree with the UFU all amendments and revisions to work instructions (approximately 100) and training manuals which support the JSOPs and which are required to ensure alignment in the MFB's service delivery.

6. Effect of the issue

The consultative requirements under the 2010 Agreement, on the evidence of the MFB, render the necessary changes in MFB procedures and practices under the new emergency management reform programme almost unachievable.[571]

As stated by Mr Youssef in his statement (**MFB-14**) at [44]:

> *The MFB's ability to shift the organisation to a position where its people, systems and resources can be deployed to maximum effect is severely constrained by the existing consultative arrangements.*

The practical effect of this is that the MFB is unlikely to swiftly align itself with the requirements of the emergency response regime in Victoria[572] and may, as with the Thomastown grassfire, find itself operating in a manner which undermines the efficiency of the management of incidents and potentially the safety of fire fighters on the fireground.

This is simply an unacceptable position for the MFB. It is a bad outcome for the MFB, its firefighters, the firefighters of other State services and for the Victorian community.

[571] Youssef at PN1327-PN1328 and statement of David Youssef (**MFB-14**) at [43]
[572] Statement of David Youssef (**MFB-14**) at [43]

Appendix Y

Issue regarding commission of Mark V trucks for EMR heatwave response

1. Outline of issue

On 13 January 2014, Deputy Chief Officer David Youssef and then acting Chief Officer Peter Rau attended a meeting of the State Emergency Management Team (SEMT), where senior management of all major agencies in Victoria meet to discuss management of events that have or are likely to occur.[573] At the meeting the Operations Manager of Ambulance Victoria raised concerns about a significantly increased risk of cardiac arrest in the Victorian community due to the forecast heatwave, with estimates that cardiac arrests would increase from around 11 per day to 75 per day.[574] Ambulance Victoria requested assistance from the MFB.[575]

The MFB considered proposals to assist Ambulance Victoria, and determined that the best and safest option was to provide an increased emergency response capability by putting the MFB's nine new Mark V Pumper Trucks into commission.[576]

At that point the MFB had been consulting with the UFU for an extended period trying to get the new Mark V Pumper Trucks into commission, but the UFU had not agreed to the commissioning of the trucks.[577]

On 13 January 2014 the MFB sought to consult with the UFU regarding the commissioning of the trucks for the purpose of providing the increased emergency response assistance to Ambulance Victoria during the heatwave.[578] The next day Casey Lee of the UFU raised a grievance under the dispute resolution process concerning the proposal put by the Chief Officer.[579] The MFB sought to resolve the grievance but were unable to.[580]

The MFB therefore elected on 15 January 2014 to file a section 418 application at the Fair Work Commission in an effort to ensure non-interference by the UFU in the implementation of the proposal.[581] In conference at the Fair Work Commission, the UFU agreed that it would not take,

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[573] Statement of David Youssef (**MFB-14**) at [172] and statement of Peter Rau (**MFB-7**) at [60]
[574] Statement of David Youssef (**MFB-14**) at [173] and statement of Peter Rau (**MFB-7**) at [60]
[575] Statement of David Youssef (**MFB-14**) at [172] and statement of Peter Rau (**MFB-7**) at [62]
[576] Statement of David Youssef (**MFB-14**) at [177] and statement of Peter Rau (**MFB-7**) at [76]
[577] Statement of David Youssef (**MFB-14**) at [178] and statement of Peter Rau (**MFB-7**) at [78]
[578] Statement of David Youssef (**MFB-14**) at [179] and statement of Peter Rau (**MFB-7**) at [66]
[579] Statement of Peter Rau (**MFB-7**) at [67]
[580] Statement of Peter Rau (**MFB-7**) at [68] – [75] and [79]
[581] Statement of David Youssef (**MFB-14**) at [179] and statement of Peter Rau (**MFB-7**) at [79]

encourage or support any industrial action regarding the training on or use of the Mark V Pumper Tankers for increased emergency response.[582]

2. Relevant provisions of the 2010 Agreement

***Clause 88 – Uniforms and Equipment,* in particular:**

> *'88.1 The MFESB and UFU must agree on all aspects of the:*
> *...88.1.4 appliances; to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'*

***Clause 13 – Consultative Process,* in particular:**

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

***Clause 19 – Dispute Resolution,* in particular:**

> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of David Youssef (**MFB-14**) at [171] - [186];
- the reply statement of David Youssef (**MFB-15**) at [20] – [25];
- the witness statement of Peter Rau (**MFB-7**) at [59] – [89]; and
- Transcript PN371 – Transcript PN404 and Transcript PN478 – Transcript PN503 (Mr Rau), Transcript PN1637 – Transcript PN1699 (Mr Youssef).

The MFB was faced with a very serious situation in the middle of a heatwave in which it was desperate to commission the Mark V appliances in order to provide increased emergency response capability to assist Ambulance Victoria.[583]

The evidence of Mr Rau is that he was 'astounded' at the need to negotiate with the UFU about a proposal where the known position was that a large number of people would have had heart issues, and that the MFB had to make an application to the Fair Work Commission to resolve it.[584]

The UFU raised three safety concerns regarding the commissioning of the Mark V Pumper Tankers which it raised as objections to the Mark V appliances being used for the emergency

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[582] Statement of David Youssef (**MFB-14**) at [180] and statement of Peter Rau (**MFB-7**) at [81]
[583] Youssef at PN1680 and PN1696
[584] Statement of Peter Rau (**MFB-7**) at [86]

response proposal.[585] The MFB evidence is that it would not have commissioned the trucks without first resolving these issues in any case and regardless of the requirement to consult with the UFU. This is stated by Mr Rau in his witness statement (**MFB-7**) at [89] and by both Mr Rau and Mr Youssef under cross examination.[586]

Further, the position of the MFB was that the issues being raised by the UFU were part of a wider political campaign involving Ambulance Victoria union officials and the numbers of ambulance employees.[587] As stated by Mr Rau under cross examination at Transcript PN401-Transcript PN403:

> *But the issue is that we had confirmation from AV that the number of people suffering heart attacks was going to increase from about 12 to about 75. We had some fires on the landscape. There were no guarantees of what was going to happen over the next few days apart from this, we were going to lose people, and in my view, the ability to get those appliances on the road was a significant high priority. Subject to the need for people to be trained in using - driving the trucks, the rest of it I felt was just in buggerance.*
>
> *I'm sorry, what was that word?---In buggerance.*
>
> *I don't know what that means?---Well, some of the things we were putting in place, we had Ambulance Victoria union officials involved in discussions. It became a political discussion about more ambulance officers and it just seemed to get off track from what everyone within the state control team believed was something that the Victorian community needed, and that was one of the most disappointing days that I've had with the organisation in that it wasn't about reducing numbers, it was actually about increasing numbers to go onto appliances that they were trained to do - trained, so I wasn't going to put anyone on there that wasn't trained to actually drive the truck, and to undertake an activity that they were trained to do.*

The requirement under the 2010 Agreement to consult with the UFU and ultimately go to the Fair Work Commission to have the UFUI withdraw it grievance and end the status quo requirement, resulted in both a waste of precious time and resources in the middle of the fire season.[588] As stated by Mr Youssef under cross examination at Transcript PN1696:

> *... We were desperate to commission those appliances and we had no problem at all agreeing to those restrictions, none at all, because we were just seeking a way to put nine additional pumpers on the road with highly skilled firefighters to save lives in Victoria, and eventually we did that, but because of the nature of this agreement we weren't able to do it in a timely manner and my - I was, I believe, the state agency commander at that time in the state control centre and I was distracted from my other preparedness activities and I had to come down to the commission with another deputy chief officer late at night when I should have been doing other work to resolve this issue.*

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[585] Statement of Peter Rau (**MFB-7**) at [78] and statement of David Youssef (**MFB-14**) at [181]
[586] Rau at PN401-PN403 and Youssef at PN1697-PN1698
[587] Statement of Peter Rau (**MFB-7**) at [71] and Rau at PN402
[588] Statement of Peter Rau (**MFB-7**) at [85] - [89], statement of David Youssef (**MFB-14**) at [182],

Then acting Chief Officer, Mr Rau, considered this incident as one of the most disappointing days that he has had with the MFB, when all the MFB were trying to do was increase the numbers of appliances and firefighters to undertake a job which they were trained to do.[589]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Robert Psailia (**UFU-21**) at [45] – [69] and [148] – [150;
- the witness statement of Alan Quinton (**UFU-28**) at [11] – [12];
- the witness statement of Allan Morton (**UFU-56**) at [11] – [19];
- the witness statement of Andrew Morton (**UFU-74** (Formalised Statements)) at [12] – [19]; and
- Transcript PN8670 – Transcript PN8982 and Transcript PN8992 – Transcript PN9020 (Mr Psaila) and Transcript PN10271 – Transcript PN10274 and Transcript PN10363 – Transcript PN10416 (Mr Quinton).

The UFU evidence given by Mr Psaila was in accordance with the MFB evidence that:

- the January 2014 heatwave was predicted to result in a substantial increase in the number of cardiac arrests;[590]
- this was an urgent situation which could result in a loss of life;[591]
- the MFB has the unique ability to assist Ambulance Victoria through its emergency response programme;[592] and
- this ability was a benefit to the community at large.[593]

Despite this, the UFU position was that it would not agree to the utilisation of the Mark V appliances to provide the extra emergency response because the appliances were said to be faulty and thereby provided a safety risk to firefighters and to the Victorian community.[594] However, as set out in the evidence of the MFB, the MFB had no problem with implementing restrictions on the vehicles to address those issues of concern to the UFU and would have done so regardless of any consultation requirement with the UFU.[595]

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[589] Rau at PN403
[590] Psaila at PN8769- PN8683
[591] Psaila at PN8722 and PN8684
[592] Psaila at PN8686 and PN8688
[593] Psaila at PN8687
[594] Statement of Robert Psaila (**UFU-21**) at [55], [34] – [36] and [59] – [60];
[595] For example, Rau at PN401-PN403 and Youssef at PN1697-PN1698

The UFU evidence was further that it also objected to the proposal because its firefighters were said not to be appropriately trained to provide this response and that it could in fact harm the public.[596] However, both UFU witnesses who were cross examined on the issue agreed under questioning that MFB firefighters were trained on emergency response and that the MFB were not requesting that they do anything other than provide that response which they were trained on.[597] As agreed by Mr Psaila under cross examination at Transcript PN8807-Transcript PN8811:

> *My question to you, you were not being asked in the chief officer's proposal to do anything other than your first responder duties. Correct?---Yes, that's what the chief officer asked, yes.*
>
> *(d), you had a concern that a process be put in place that would expose the public to potential risk?---Yes.*
>
> *The job was to assist the public, those members of the public under cardiac arrest, wasn't it?---And heat stress situations.*
>
> *Under cardiac arrest. Is that right?---Yes.*
>
> *Do you think it might have been of more assistance to members of the public that you be there than not?---Yes.*

The UFU evidence was further that it in principle supported the proposal to put on the additional primary appliance Mark V trucks,[598] but required an emergency meeting of the V&E Sub-Committee as well as 'all documentation and details of proposals' before agreeing.[599] This was in addition to the UFU asking 38 questions regarding the initial proposal.[600]

Mr Psaila was cross examined on the requests for this information, in light of the urgency of the situation for the MFB. Regarding the drafting of the 38 questions, Mr Psailia responded as follows:

> *If you then go to RP4. You then attach what you say in the afternoon of 14 January, so the heatwave is continuing, presumably Ambulance Victoria responding to the increased need in cardiac arrests, and the UFU decides to send out a list of 38 questions, 'In order for it to formulate a considered proposal and a timely response, please.' That's correct, isn't it?---I'm still looking for the section you're talking about. RP what?*
>
> *RP - page 47 on the top right?---47, thank you.*
>
> *Do you have any recollection of this without having to go to the exhibit?---I do.*
>
> *Did you draft the 38 questions - - -?---No.*
>
> *- - - or is that something Mr Lee went away and did?---Someone else did it. I don't know who.*
>
> *You don't know who?---No.*

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[596] For example, statement of Andrew Morton (**UFU-74**) at [14] and [16]; statement of Allan Morton (**UFU-56**) at [12]; statement of Alan Quinton (**UFU-28**) at [11]; statement of Robert Psaila (**UFU-21**) at [48] and [50];

[597] Quinton at PN10391-PN10398 and Psaila at PN8807-PN8811. See also the reply statement of David Youssef (**MFB-15**) at [22].

[598] Statement of Robert Psaila (**UFU-21**) at [57]

[599] Statement of Robert Psaila (**UFU-21**) at [57]

[600] Statement of Robert Psaila (**UFU-21**) at [52]; statement of Peter Rau (**MFB-7**) at [72];

Do you think it might have been important to review those questions before they went out?---For myself?
Yes?---Yes.
But you didn't?---No.[601]

Regarding the request for documents, Mr Psaila's evidence is as follows:

All right. So at the moment in a heatwave emergency surge response and you want can we say plenty of documents and minutes and records. Correct?---Yes.

You're interested in question 7?---Yes.

So did you then obtain the 2009 report that you were interested in?---I don't recall.

Well, it's not a very satisfactory answer, with respect, Mr Psaila?---Sorry.

You've said you're interested on the 14th - there's a heatwave?---Yes.

Your union has demanded an answer to 38 questions so that they can put some appliances on the road, and you're interested in obtaining the 2009 April report, and you don't even have any recollection of obtaining it. Is that right? Is that your evidence?---That was - that's what I said, yes.

That's your evidence?---I don't remember.

Can I dare to say without going through all the questions that you probably therefore don't remember what the response to the 38 questions was unless I read it line by line?---Yes, that would be correct.

And at the time you didn't trouble yourself to read line by line the responses on 14 January either, did you?---No.[602]

Regarding the UFU requests for further information regarding the Mark V proposal prior to attendance at the Fair Work Commission, Mr Psaila stated as follows:

Then at paragraph 57 you set out the UFU response to that straightaway proposal. So what we have again at the fourth paragraph, 'The UFU is agreeable to consider the proposed increase in primary appliance across the MFD subject to concerns as outlined below'?---Which page are you on?

So this is page 13 of your statement?---Yes.

Can you see that paragraph?---Yes.

So again we don't have agreement at this point either to that straightaway proposal?---Okay.

Correct?---Correct.

Were you made aware of this letter before it was sent out?---I believe I was.
All right. Well, you've set it out in your statement, but not attached it. Is this something drafted by Mr Lee?---Once again I don't know who drafted it.

Well, was it most likely drafted by Mr Lee?

---I don't know who drafted it.

All right. Well, you are attending the commission on 14 January. Correct?---Yes.

You've been provided with the list of questions. Correct?---Yes.

You've been provided the answers, but didn't read them. Correct?---Correct.

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[601] Psailia at PN8827-PN8835

[602] Psaila at PN8929-PN8937

The UFU had also raised issues regarding another of the MFB's proposals to increase its emergency response, which was the use of light fleet vehicles. This included a concern that the equipment to be transported in the back of the light fleet vehicles would not be secured down.[603] Under cross examination, Mr Psaila agreed that the MFB had proposals in place for securing the equipment[604] and that he had no concerns if the equipment was properly secured. Mr Psaila also agreed that he had not raised this issue with management prior to the grievance being lodged.[605]

This is also an example of where the UFU raises a grievance seemingly without first discussing its concerns internally or with the MFB first. Mr Psaila's evidence was that the grievance was raised on the basis of certain concerns. However on cross examination on this aspect of the issue, Mr Psaila stated as follows:

> *My earlier question to you was between 6.40 pm* [time Mr Lee notified of MFB proposal] *and 10.11 pm when the grievance was notified - - -?---Yes.*
>
> *- - - it's the case, isn't it, that you had no discussion whatsoever with either Mr Lee or Mr Marshall?---I don't remember. I don't remember ever discussing that at that time.*
>
> *So I take it that, 'I don't remember,' means you remember that you had no discussion with them?---I don't remember if I had or hadn't.*
>
> *THE COMMISSIONER: What were you doing in that period? When was the first time that you saw the email that you've attached as RP2?---To be honest, Commissioner, I cannot remember when I first saw that.*
>
> *Was it on the same night?---I cannot remember. I don't know. I cannot remember what day it was.*
>
> *Might it have been that it was provided to you some time later?---I would imagine so, but as I said I cannot remember when the first time I saw that was.*
>
> *When was the first time you became aware of the proposal from Mr Rau to change the EMR arrangements?---I remember going to a meeting which was held - being invited to a meeting which was held between obviously the UFU and Peter Rau at the time who was not in the room, he was on the phone, and we had a few people in the room and we were discussing the issues around that.*
>
> *Which day was that?---I think that was the next day but I'm not - I don't remember the days. I attend a lot of meetings and every day is just a blur, which days are which.*
>
> *Thank you.*[606]

5. Operation of the 2010 Agreement

The broad scope of the consultation and dispute resolution clauses in the 2010 Agreement operated to allow the UFU to stop the MFB implementing the emergency response proposal regarding use and allocation of its resources.

6. Effect of the issue

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[603] Statement of Peter Rau (**MFB-7**) at [64] and for example, statement of Robert Psaila (**UFU-21**) at [11] and statement of Alan Quinton (**UFU-28**) at [11]

[604] Reply statement of David Youssef (**MFB-15**) at [23] – [24]

[605] Psaila at PN8825-PN8826

[606] Psaila at PN8763 - PN8771

The effect of the UFU's ability to require full consultation on the emergency response proposal, and to use the dispute resolution clause to halt the implementation of the proposal had the following effects:

(e) The MFB senior management spent significant time and effort to consult with the UFU and resolve the issue when these individuals should have been undertaking other essential operational planning and readiness activities during that period of heightened risk to the community.[607]

(f) The MFB was unable to secure the agreement of the UFU to the proposal to put on additional resources to provide emergency response assistance to Ambulance Victoria and had to go to the Fair Work Commission to have the UFU withdraw its grievance and thereby remove the status quo requirement.[608]

(g) This resulted in a delay to the MFB being able to provide increased emergency response assistance at a time when Ambulance Victoria experienced a 700% rise in the number of call-outs for cardiac arrests on one day during the heatwave, and recorded 139 deaths in excess of the average over the period.[609]

This is a ludicrous environment for the MFB to occupy.610 This is especially so in light of the increased interoperability required of the UFU, which will require the MFB to have complete agility to be able to deploy resources to where they are needed.611

The 2010 Agreement in this example resulted in a very bad outcome for the MFB, and in particular the Victorian community.

This matter exemplifies why the veto power given to the UFU under the 2010 Agreement should cease.

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[607] Statement of Peter Rau (**MFB-7**) at [85] – [87] and statement of David Youssef (**MFB-14**) at [182]; Youssef at PN1996;
[608] Statement of Peter Rau (**MFB-7**) at [68] – [75] and [79]
[609] Statement of Peter Rau (**MFB-7**) at [89] and [83] – [84]
[610] Statement of Peter Rau (**MFB-7**) at [88]
[611] Statement of Mr Youssef (**MFB-14**) at [184] and [186]

Appendix Z

Issue regarding Operational Support Group (OSG) and Fitness for Duty Project

1. Outline of issue

The operational support group (**OSG**) is comprised of operational employees of the MFB who are unable to carry out the full functions of their role.[612] The 2010 Agreement places limits around the extent to which members of the OSG can be allocated to rostered duties and effectively provides that any such rostering must only be to a limited number of positions previously agreed between the MFB and UFU.[613]

The MFB also wishes to improve its monitoring and compliance of the health and safety of its employees through a new 'Fitness for Duty' project, which would include a compulsory health and fitness test. This would lead to better management of firefighters on OSG to avoid them remaining on OSG or being unable to return to work without a clear expectation of returning to operational duties.[614] The current consultative arrangements would require the agreement of the UFU prior to implementation of this project.[615]

2. Relevant provisions of the 2010 Agreement

***Clause 91: Operational Support Group,* in particular:**

> *'91.3: No member of the OSG may be rostered for any of the positions referred to in the crewing provisions and chart, with the exception of the limited number of positions as previously agreed between the parties.'*
>
> *'91.5: Subject to this clause, the MFESB will endeavour to provide suitable employment for each member of the OSG. In the event that there is no such position the parties agree to meet and discuss how to resolve this matter.'*

Clause 15: Introduction of Change

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.'*

Clause 13: Consultative process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

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[612] Statement of Adam Dalrymple (**MFB-20**) at [53]
[613] Statement of Andrew Zammit (**MFB-10**) at [20] – [22]
[614] Statement of Adam Dalrymple (**MFB-20**) at [55] – [56]
[615] Statement of Adam Dalrymple (**MFB-20**) at [58]

- the witness statement of Andrew Zammit (**MFB-10**) at [20] - [31];
- the reply witness statement of Andrew Zammit (**MFB-11**) at [9] – [12];
- the witness statement of Adam Dalrymple (**MFB-20**) at [53] – [58];
- the reply statement of Adam Dalrymple (**MFB-21**) at [15]; and
- Transcript PN925 – Transcript PN943 (Mr Zammit) and Transcript PN2794 – Transcript PN2800 (Mr Dalrymple).

The MFB's position is that in some cases, whilst a member of the OSG may be unfit for *all* operational duties, there may be circumstances where that member's skills and experience could be utilised in a range of capacities, including on the fireground (such as on the control unit).[616]

As set out at [23] to [29] of Mr Zammit's witness statement in relation to this issue:

> *There are only twelve positions currently agreed for members of the OSG: the watch room at Eastern Hill (4 positions), works officer (4 positions) and car driver (4 positions). A works officer is a firefighter who is ranked Station Officer or above that coordinates the logistics for jobs.*
>
> ...
>
> *The 2010 Agreement ... provides the UFU with a power of veto in relation to the creation of new positions for members of the OSG. Within the scope of my own role there are potentially a lot of jobs in an incident management sense that could assist me as an incident controller to document decisions, communicate messages on my behalf or consult with the community.*
>
> *The 2010 Agreement diminishes our opportunities to value the contribution of members of the OSG...* [617]

Ultimately, in relation to members of the OSG, the MFB's position is that it should be up to the Chief Officer to determine, in consultation with the medical advice, what role they can do on the fireground.[618] As Mr Zammit stated under cross-examination, '*I'm just suggesting, with a bit of lateral forethought, we can provide some meaningful work for other people.*'[619]

The same principle applies as regards the Fitness for Duty project. The MFB does not consider that, under the current consultative arrangements, the MFB will be able to introduce the Fitness for Duty initiative as the UFU would never agree to it.[620] Ultimately this prevents the MFB from begin able to consider staff welfare in line with business principles.[621]

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[616] Statement of Andrew Zammit (**MFB-10**) at [25] – [26]
[617] Statement of Andrew Zammit (**MFB-10**) at [23] – [24]
[618] Zammit at PN932.
[619] Zammit at PN934.
[620] Statement of Adam Dalrymple (**MFB-20**) at [58]
[621] Statement of Adam Dalrymple (**MFB-20**) at [57]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Danny Malcolm Ward (**UFU-19**) at [56] and [71] – [76].

The UFU's position regarding OSG, as set out at [72] of the statement of Mr Ward, is that:

It is generally not appropriate that personnel who are not fully fit for operational duties attend work on the fireground. This is for various safety reasons such as all personnel on the fireground can be required to don PPC and BA and evacuate if necessary. Potentially, an OSG person may not be in a position to do this thereby exposing them to further risk or aggravation of a pre-existing injury. By nature, the fireground is more hazardous and presents higher levels of risk.

Also, at [73], where Mr Ward states:

> *...during the life of this agreement the parties have reached agreement on a case by case basis of extra OSG roles of personnel who do, in a limited capacity, attend the fireground such as district car driver and the rehabilitation unit. This illustrates that the UFU does and is willing to consult regarding extending OSG roles when the MFB has put forward such a proposal.*
>
> However, as stated by Mr Zammit in his reply statement where he acknowledged these comments, he reiterated that the fact remains, under the 2010 Agreement, the MFB still requires the UFU's agreement in order to take a proactive approach to managing its employees.
>
> Regarding the Fitness for Duty Project, Mr Ward states at [56] of his witness statement (**UFU-19**), that the UFU has '*generally been supportive of fitness and health initiatives for MFB employees*.' This is contrary to the evidence of Mr Dalrymple, who states that:
>
> *We know from past experience that the UFU is not an advocate for compulsory fitness testing because it could be perceived as a management tool to adversely affect staff.*[622]

5. Operation of the 2010 Agreement

The effect of clauses 91.3 and 91.5 is that the MFB may only create and deploy members of the OSG into positions agreed by the UFU.

Those clauses, coupled with clause 13, also impose extensive consultation obligations and require the agreement of the UFU in terms of how and to what roles the MFB deploys members of the OSG.

The broad scope of the consultation requirements means the MFB must also consult and seek agreement of the UFU to any changes to its management of firefighters' fitness for work, including the Fitness for Duty project.

6. Effect of the issue

The effect of clauses 91.3 and 91.5 of the 2010 Agreement is that the MFB is hamstrung in its ability to make decisions concerning how it utilises members of the OSG; particularly those who

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[622] Statement of Adam Dalrymple (**MFB-20**) at [57]

are not fully fit for operational firefighting but who are fit to perform other non-fire fighting duties on the fireground (such as in the control room assisting an incident controller). The MFB is precluded from utilising members of the OSG to their maximum potential and thereby limited in its ability to discharge its statutory obligations.

The evidence of the MFB is that there are a myriad of potential uses but, given the operation of clauses 91.3 and 91.5 of the 2010 Agreement, absent agreement of the UFU, the MFB is unable to effectively utilise members of the OSG capable of performing such roles. This applies equally to the MFB's ability to monitor and manage the fitness of its employees, with the MFB not being confident that the UFU would ever agree to the new Fitness for Duty project. This is a bad outcome.

Appendix AA

Chinagraph Pencils

1. Outline of issue

In 2009, the MFB wanted to change the type of chinagraph pencil used by operational staff. The MFB wanted to change the model of the pencil used but retain the manufacturer, Staedtler.[623]

Sample pencils were trialled in the workplace and were positively received by firefighters.[624] In order to introduce the pencils, the MFB had to obtain the agreement of the UFU through the Vehicle and Equipment Committee under the predecessor agreement to the 2010 Agreement (the 2005 Agreement).[625]

2. Relevant provisions of the 2010 Agreement

This example occurred under the 2005 Agreement, however, the approach to the change of pencil is relevant in the context of the evidence of Messrs Clearly, Psaila and Riley about the breadth of matters requiring endorsement under the 2010 Agreement. The relevant provision of the 2005 Agreement was:

***Clause 9.2 – Enterprise Bargaining Implementation Committee*, in particular:**

> *'9.2.2. The EBIC will comprise equal numbers of management and employee representatives as determined by the respective parties, and decision making will be by consensus'*; and
>
> *'9.2.5. The respective parties, at their own initiative, may require the endorsement of their constituents in relation to proposals for change. No change or proposals for change arising from or relating to matters dealt with in this Agreement or in matters pertaining to the employment relationship or in the way work is carried out shall be implemented without referral to the Enterprise Bargaining Implementation Committee.'*

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Andrew O'Connell (**MFB-25**) at [100] – [117]; and
- the reply witness statement of Andrew O'Connell (**MFB-26**) at [43].

The MFB's position is that *'the process had to be followed for procedure's sake'*[626] but no value was added by the Vehicle and Equipment Committee. On the contrary, obtaining endorsement

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[623] Statement of Andrew O'Connell (**MFB-25**) at [101]
[624] Statement of Andrew O'Connell (**MFB-25**) at [100]
[625] Ibid.
[626] Statement of Andrew O'Connell (**MFB-25**) at [100].

from the Vehicle and Equipment Committee delayed the implementation of the pencils. This was undesirable as the pencils improved firefighters' safety while using breathing apparatus.[627]

As Mr O'Connell says at [115] and [116] (**MFB-25**):

> *'In my mind, the trial with the end users is what matters most. We needed to make sure that the end product actually suited the needs of operational staff.*
>
> *While it was reasonable to expect that the results of this trial were reported to BAHDEC, it was frustrating that after I had confirmation from end users that the pencils were a great solution to the problem, this then had to be taken through the V&E Committee.'*

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Christopher Cleary (**UFU-20**) at [52];
- transcript including at Transcript PN8505 – Transcript PN8511 (Mr Cleary), Transcript PN8640 (Mr Psaila) and Transcript PN10150 – Transcript PN10152 (Mr Riley).

The UFU's position in respect of the chinagraph pencil appears to be that consultation did not delay the implementation of the pencils and that the Vehicle and Equipment committee had regard to the consultation process that had already been undertaken.[628]

5. Operation of the 2010 Agreement

In this example, the effect of the consultation clause of the 2005 Agreement meant that the MFB was unable to change the model of pencil that it used without agreement of the UFU through the consultative process in the 2005 Agreement. The evidence of Messrs Cleary and Psaila[629] about the requirements of the 2010 Agreement was that it required the parties to consult and agree on even the most minute of matters e.g a change to the colour of a pencil. That the UFU hold this view and can in practice enforce the requirement for UFU agreement to the most minute of changes by use a grievance, invocation of the status quo, supported by a UFU bulletin to members to enforce the status quo, shows how any sensible and timely management of even minute matters has been curtailed.

6. Effect of the issue

The chinagraph pencils are a simple but important piece of equipment. The introduction of the new model was important, including for minimising risks to health and safety of firefighters. Consultation took place directly with end-users without any agreement requirement that this happen, but which occurred as a matter of practice. The consultation process under the 2010 Agreement consultation process added no value and merely delayed implementation of the final initiative.

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[627] Statement of Andrew O'Connell (**MFB-25**) at [100].
[628] Statement of Christopher Cleary (**MFB-20**) at [52].
[629] See PN8511(Mr Cleary) and PN8640 (Mr Psaila).

The effect is therefore that the 2010 Agreement delayed a health and safety initiative, with no corresponding benefits.

Appendix BB

Introduction of Workplace Policies and Guidelines

1. Outline of issue

In early 2012, the MFB drafted a suite of policies and guidance notes in relation to human resources matters such as sick leave, annual leave, payroll processing, higher duties and employee transfers (**Polices and Guidance Notes**) to address a lack of adequate equivalent documents.[630]

Implementation of the Policies and Guidance Notes was subject to the consultation process[631] and an initial report was put together for the Consultative Committee in November 2012.[632]

The UFU sought legal advice in relation to the Policies and Guidance Notes[633] and requested a range of further information from the MFB.[634] The MFB provided a number of versions of the Policies and Guidance Notes to assist the UFU to consider them and provide a response.[635] The UFU, after a number of months, stated that the Policies and Guidance Notes did not comply with the Agreements[636] and raised a grievance when this was rejected by the MFB[637].

The consultation process is considered by the MFB to have been exhausted and the Policies and Guidance Notes are now ready to be put into operation.[638]

2. Relevant provisions of the 2010 Agreement

Clause 15 - Introduction of change:

> *'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.'*
>
> ***Clause 13 - Consultative process,* in particular:**
>
> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*
>
> ***Clause 19 – Dispute Resolution,* in particular:**
>
> *'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that*

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[630] Statement of Michael Anthony Werle (**MFB-35**) at [13].
[631] Statement of Michael Anthony Werle (**MFB-35**) at [18].
[632] Statement of Michael Anthony Werle (**MFB-35**) at [21].
[633] Statement of Michael Anthony Werle (**MFB-35**) at [24] and [32].
[634] Statement of Michael Anthony Werle (**MFB-35**) at [34] and [45].
[635] Statement of Michael Anthony Werle (**MFB-35**) at [60].
[636] Statement of Michael Anthony Werle (**MFB-35**) at [65].
[637] Statement of Michael Anthony Werle (**MFB-35**) at [67].
[638] Statement of Michael Anthony Werle (**MFB-35**) at [78].

existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Michael Anthony Werle (**MFB-35**) at [10]-[78]
- the reply witness statement of Michael Anthony Werle (**MFB-36**) at [7]-[22]; and
- Transcript PN4456 – Transcript PN4698 (Mr Werle).

The MFB's position is that the introduction of these policies is necessary because there is a lack of helpful policies and procedures on the intranet[639] and they are an important mechanism for proper administration within the organisation[640].

The MFB had been careful to ensure compliance with the Agreements.[641] As set out in Mr Werle's witness statement (**MFB-35**) at [18]:

> *Throughout the process of developing the Policies and Guidance Notes, I was very careful to avoid including anything that was inconsistent with the Agreements. I didn't want the UFU claiming that the MFB was seeking to change the intent of a clause or vary an agreement. I included a statement in the Policies and Guidance Notes to the effect that the guidance notes should be interpreted in conjunction with relevant enterprise agreements, administrative arrangements and policies applying to occupational groups.*
>
> Mr Werle's evidence is that the process of consultation was delayed due to the UFU's failure to provide feedback in a reasonable amount of time despite numerous requests[642] and despite a number of attempts to engage with the UFU[643] and to date the Policies and Guidance Notes have not been put into practice.[644] As set out in Mr Werle's witness statement (**MFB-35**) at [134]:
>
> *It is very frustrating. We have worked hard to demonstrate that the Policies and Guidance Notes are consistent with the Agreements and they would be beneficial to the MFB and its employees. The UFU has not been forthcoming in the detail of its points of contention with the Policies and Guidance Notes. I have tried to draft them in language that people can understand and implement, without having to navigate other complicated documents like the Agreements. I would not have expected the process to be this difficult as the Policies and Guidance Notes reflect existing provisions. At the bottom of guidance notes we reiterate that the guidance note should be interpreted in conjunction with relevant enterprise agreements, administrative arrangements and policies applying to occupational groups.*

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[639] Statement of Michael Anthony Werle (**MFB-35**) at [11].
[640] Statement of Michael Anthony Werle (**MFB-35**) at [12].
[641] Statement of Michael Anthony Werle (**MFB-35**) at [18] and [49].
[642] Statement of Michael Anthony Werle (**MFB-35**) at [37]-[41].
[643] Transcript at PN4462.
644 Statement of Michael Anthony Werle (**MFB-35**) at [133].

The MFB's position is that this issue is an example of the consultation process taking an inordinate amount of time and being used to '*block processes with which the UFU does not agree, regardless of the importance of the matter to the MFB*'.[645]

4. Position of UFU

Evidence dealing with the position of the UFU is set out in the witness statement of Dimitra Erini Sophia Krouskos (**UFU-25**) at [159]-[188].

The UFU's position is that the Policies and Guidance Notes were inconsistent with the Agreements. As set out in Ms Krouskos' witness statement (**UFU-25**) at [162] and [169]:

> *The Operations Agreement 2010, itself outlines relevant processes and procedures without the need for further documentation. The UFU was concerned that any additional documents would lead to an inconsistency in the way they were applied. Upon an analysis of the proposed Polices, it became evident that the documents lacked detail and contained many inconsistencies between the Agreements. ...*
>
> *These documents proposed to outline how terms and conditions of employees covered by the Agreements would apply in the workplace in a manner inconsistent with the Agreements.*
>
> Ms Krouskos' evidence is that '*the MFB continuously refused to provide policies that were consistent with the Agreements*'[646] and that the dispute was lodged because '*the MFB had continuously failed to properly consult in regards to this matter*'.[647] As set out in Ms Krouskos' witness statement (**UFU-25**) at [188]:
>
> *The statement of Michael Werle that 'consultation is exhausted in relation to the Policies and Guidance Notes and is unlikely to achieve consensus' is incorrect. The UFU has on numerous occasions outlined that if the MFB simply tabled documents that were in accordance with the Enterprise Agreements and working conditions of employees contained therein, consensus would have been achieved. The MFB refused to provide documents that accurately reflected the current work practices and Agreements. The MFB wanted the UFU to provide an exhaustive list of all its concerns in writing. To do so would inevitably mean that the UFU would be undertaking a complete re-draft of the MFB's policies and guidance notes. It was for these reasons only that consensus had not been achieved to date and the reason for the UFU lodging a dispute in order to seek a quick resolution of this matter via the correct consultative mechanisms. Consultation was vital in this case not just because it was required under the Agreement but because these policies would have a real effect on employees' terms and conditions of employment and how they would be applied in the workplace.*

5. Operation of the 2010 Agreement

The effect of the operation of clauses 13 and 15 of the 2010 Agreement is that, without the agreement of the UFU, the MFB is unable to implement procedural mechanisms like internal policies and guidance notes within a reasonable time of identifying that those mechanisms are necessary.

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[645] Statement of Michael Anthony Werle (**MFB-35**) at [132].
[646] Statement of Dimitra Erini Sophia Krouskos (**UFU-25**) at [185].
[647] Statement of Dimitra Erini Sophia Krouskos (**UFU-25**) at [187].

6. Effect of the issue

As a result of the delay associated with the consultation process and the lodging of a grievance (although the evidence differs in relation to which party contributed to the delay), the employees and managers were without the assistance of mechanisms by which to effectively administer terms and conditions of employment.[648]

The 2010 Agreement means that the MFB cannot implement measures even when they are procedural and designed to assist the effective operation of the Agreements. The fact that there were no formally documented policies and procedures in place had been noted in a Deloitte Audit Report.[649] The delays meant that the absence of these documents, once identified, could not be addressed in a reasonable amount of time.

This outcome is detrimental to the ability of the MFB to implement the procedures necessary for effective management of employees.

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[648] Reply statement of Michael Anthony Werle (**MFB-36**) at [8].
[649] Witness statement of Michael Anthony Werle (**MFB-35**) at [25]-[26].

Appendix CC

Issues regarding FAL and FAST-card

1 Outline of issues

FAL

On 24 January 2012, Deputy Chief Officer Youssef attended a significant grass fire at Westmeadows. At that grass fire, Mr Youssef sought the assistance of the police helicopter crew to determine where the various MFB appliances and people were, given there were at the time no GPS devices attached to the appliances.[650] On 30 January 2012, Mr Youssef encountered similar difficulties at another fire at Yarra Valley Grammar School in Ringwood.[651] As at January 2012, the usual system for identifying which firefighters were on scene was via a magnetic board fixed to the side of an appliance.[652] The deficiencies noted by Mr Youssef caused him to have concerns about the ability of the MFB to quickly and accurately identify who was in charge of appliances and where firefighters and appliances were at any given time.[653]

The MFB conducted a review of the Yarra Valley fire and then decided to come up with a solution for the MFB to determine at any point in time which had its people were on the fire ground, where they were and what they were doing. Statement of Youssef (MFB-14) at [52] – [53] As a first stage of the solution, the MFB proposed to implement district and appliance-based fire ground and accountability lists (**FAL**) to work in conjunction with existing systems.[654] The FAL was in the form of an Excel spreadsheet, which was to be updated on each shift by district operations commanders - see an example of the spreadsheet at **MSB–24**.

Mr Youssef's evidence was that the FAL would provide some increased visibility and accountability of employees by identifying who was on shift at any time. It would also uncover undocumented shift changes or swaps. Its introduction was to be an interim measure and should have been seen as an uncontroversial proposal, which was aimed only at improved firefighter safety and operational efficiency. Essentially, the FAL spreadsheet was a snapshot of the information at the start of each shift.[655] The UFU resisted the implementation of the FAL.[656]

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[650] Statement of Youssef (MFB-14) at [45]; PN1424
[651] Statement of Youssef (MFB-14) at [49]; PN1424
[652] Statement of Youssef (MFB-14) at [50]; PN1424
[653] Statement of Youssef (MFB-14) at [51]; PN1424
[654] Statement of Youssef (MFB-14) at [55].
[655] PN1485
[656] Statement of Youssef (MFB-14) at [57] – [59].

At the same time as the interim measure of the FAL was considered, the Fireground Accountability System T-card system was being developed (**FAST-card**).[657]

By virtue of the operation of the 2010 Agreement, Mr Casey Lee first notified Mr Youssef that he was required to refer the proposed FAL to the Consultative Committee; and further, on or about 20 February 2013, notified Mr Youssef of a grievance over the proposed implementation of the FAL.[658] In order to attempt to resolve the grievance, Mr Youssef met with Mr Lee. However, Mr Youssef was frustrated with Mr Lee given he was dealing with an operational issue. At Transcript PN1539-1540, under cross-examination Mr Youssef explained his position as follows:

> *Can I suggest to you that the tension right from the start contributed to the hostility between the two parties at the meeting?---I was really worried about the safety of our firefighters.*
>
> *But you were dismissive of Mr Lee's capability to deal with the issues and he responded back to you?---**Mr Lee has no qualifications in firefighting. Commissioner, if I'm going to be consulting with people about firefighter safety, I want to be talking to someone who understands firefighting**, not to be talking to someone who has no understanding of the complexities of firefighting. I was surprised that there wasn't someone there that I could have a conversation with, and some of the issues that they might have been raised could have been very legitimate and at least we'd be starting from the basis of an understanding of firefighting. Mr Lee is not a firefighter and I don't think that - you know, I was just annoyed that they didn't send someone who I could have a proper conversation with.*

The practical reality was that by virtue of the 2010 Agreement, Mr Youssef was attending to a meeting with a junior industrial officer of the UFU who had no operational experience, in an attempt to seek UFU agreement to the implementation of the FAL as an interim measure. If was a very unsatisfactory situation.

After proceedings in the Commission and a recommendation issued by Commissioner Roe, a special meeting of the Consultative Committee was held on 18 March 2013 at which the parties then agreed to implement FAL.[659]

Mr Youssef notes that although agreement was eventually obtained to implement FAL, *'it took four months to implement what should have been a straightforward direction from management.'*[660]

FAST-card

The agreement between the MFB and the UFU in March 2013 to use the FAL spreadsheet included an agreement from the MFB to develop fireground accountability software within the

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[657] Statement of Youssef (MFB-14) at [96]; PN1483
[658] Statement of Youssef (MFB-14) at [75].
[659] Statement of Youssef (MFB-14) at [83] – [91].
[660] Statement of Youssef (MFB-14) at [92].

next three months, with a monthly report back to the Consultative Committee. Ultimately, this was the Fireground Accountability System T-card (**FAST-card**) program.[661]

> *FAST-card is a network-based fireground accountability system whereby staffing information can be inputted at the station level. Users can access FAST-card on their computer or appliance iPhone and quickly update or ascertain which staff are working and what appliances they are utilising. The computer program provides a number of other functions not available on the iPhone, including:*
>
> *(a) their specialist skills ;*
>
> *(b) how long an employee has been on scene;*
>
> *(c) which radio they are carrying so we can see if they have activated a distress signal;*
>
> *(d) which appliances are at an incident;*
>
> *(e) mobile phone numbers for the iPhones in the appliances;*
>
> *(f) the car number; and*
>
> *(g) the type of pumper and the specs of the appliance*[662].
>
> *FAST-card can also record the number of particular incidents that firefighters attend. For example, FAST-card has the capability to show that a particular firefighter has attended a certain number of HAZMAT (hazardous materials) incidents. This is important so that we can understand who has been exposed to what levels of chemicals. Another example is that the MFB could monitor the number of EMR calls that a firefighter has attended.*[663]

The introduction of the FAST-card was delayed in the Consultative Committee process, essentially because the UFU had concerns that the GPS data might be used in disciplinary matters.[664] Accordingly, on 2 September 2013 there was agreement only to a one month trial of the FAST-card without the tracking component.[665]

The trail was successful, and it was in October agreed in the Consultative Committee to extended FAST-card to the whole of the MFB – without GPS tracking.[666]

In Victoria, Victoria Police, Ambulance Victoria and the Department of Environment and Primary Industries use GPS tracking. Further, the Fire Services Commissioner of Victoria supported the implementation of a GPS system.[667]

The issue of agreeing upon protocols for the use of the GPS data occupied several months and involved the filing of a dispute by the MFB to the Commission. The delay was very unsatisfactory, exemplified by Mr Youssef's evidence at [138] of (**MFB-14**):

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[661] Statement of Youssef (MFB-14) at [96].
[662] Statement of Youssef (MFB-14) at [97].
[663] Statement of Youssef (MFB-14) at [98].
[664] Statement of Youssef (MFB-14) at [107].
[665] Statement of Youssef (MFB-14) at [109].
[666] Statement of Youssef (MFB-14) at [112].
[667] Statement of Youssef (MFB-14) at [117] – [119].

After undertaking six months of consultation, we had now reached the Christmas period without having reached agreement on implementation of the GPS tracking system, which the MFB considers is a crucial and important technological enhancement to the MFB's existing processes.

Those protocols were not agreed and full implementation of the FAST-card with GPS capability was not achieved until shortly before the hearing commenced in this matter.

2 **Relevant provisions of the 2010 Agreement**

Clause 88.1

The MFESB and the UFU must agree on all aspects of the:

88.1.2 equipment,...

'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.

Clause 13 - Consultative process, in particular:

'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'

3 **Position of MFB**

Evidence dealing with the position of the MFB is primarily set out in:

- the witness statement of David Youssef (**MFB-14**) at [45] - [159];
- the reply witness statement of David Youssef (**MFB-15**) at [26]; and
- Transcript PN1417-Transcript PN1591 (Mr Youssef).

4 **Position of UFU**

Evidence dealing with the position of the UFU is primarily set out in:

- the witness statement of Ms Krouskos (**UFU-25**) at [55] – [76];
- Transcript PN6439-Transcript PN6461 (Mr Tisbury) Transcript PN9897-Transcript PN9928 (Ms Krouskos).

The UFU was critical of FAL and further, argued that specific authorised training was required before Commanders could complete the spreadsheets of fire fighters working at the commencement of each shift.

The UFU was not prepared to agree to the implementation of the FAST-card until the MFB agreed to protocols for the use of the GPS data – i.e. that it would not be used for disciplinary purposes.

5 **Operation of the 2010 Agreement**

The effect of the operation of clauses 88 and 13 of the 2010 Agreement is that, absent agreement of the UFU, the MFB is unable to introduce new or replacement equipment.

6 Effect of the issue

For a significant period of time, the MFB and its firefighters were denied the use of operational tools (FAL and FAST-card) that would make the working environment safer. As put by Mr Youssef in answer to questioning by Mr Borenstein at Transcript PN1578:

> *The reason for that facility is to provide you with a valuable operational tool?*
>
> *---Absolutely. Being able to display the location of appliances on a map in itself could be incredibly valuable and particularly - not so much with regard to structure fires, but particularly with regard to grass and bushfires where crews themselves can't actually necessarily identify where they are, because, you know, you get out in the middle of a paddock, there is no street signs, Commissioner, so you can't actually say, well, you know, 'I'm on the corner of Brown Street and Smith Street,' and when they need assistance they often have - we have difficulty knowing where they are, and they have difficulty telling us exactly where they are.*

And as to the FAL, Mr Youssef notes that although agreement was eventually obtained to implement FAL, *'it took four months to implement what should have been a straightforward direction from management.'*[668]

These are very unsatisfactory outcomes.

A further feature of these issues is the power and control being exercised by the junior industrial offices of the UFU and their involvement in operational decisions of the MFB.

The inherent danger to fire fighters of no GPS tracking in a fire is obvious (e.g. Hazelwood). This was acknowledged by BCOM member of the UFU, Mr Tisbury at Transcript PN6444-Transcript PN6454:

> *You do agree? Okay, so it would be important - much evidence, and no one disputes the dangerous activities involved in firefighting, that a GPS device attached to trucks is fundamental for safe firefighting in those circumstances?*
>
> *---Oh, it's certainly advantageous, yes.*
>
> *Well, it's not only advantageous. You're in a mine, dark, low-visibility. It's a fairly fundamental, simple device, isn't it, to have attached to an appliance?---If it works, yes.*
>
> *If it works. All right?---Obviously, you want to test it, to ensure that it does work. You'd want to have the confidence (indistinct) work.*
>
> *If you're running a brigade, given the importance of that device, you'd think that that's something that management would want to make a decision to install?*
>
> *---Yes.*
>
> *Yes, and not only install it, but do it swiftly. Correct?---Yes.*
>
> *The fact is though, you know, that under your enterprise agreement, a GPS device would constitute new equipment, wouldn't it?---Yes.*
>
> *You're well-aware that clause 88 of your enterprise agreement requires that the UFU must agree with the MFB on all aspects of equipment, correct?---Yes, correct.*

---

[668] Statement of Youssef (MFB-14) at [92].

That includes a simple GPS device, correct?---Correct.

So, albeit that that technology has been around for, what, possibly a decade, or more? Correct?---Correct.

The MFB cannot install that simple equipment unless your unit agrees?---Correct.

Whilst it waits for that agreement, on your evidence, that's a very unsatisfactory and unsafe state of affairs in the very circumstance as you've just described it, Hazelwood, isn't it?---Correct.

That the MFB was unable to implement GPS tracking to appliances because of UFU concern over disciplinary issues does not justify the obstructive delay. However, a consequence of the 2010 Agreement is that the MFB simply cannot implement any new equipment without the agreement of the UFU, despite the need to do so.

Appendix DD

Issue regarding proposed refurbishment of Eastern Hill Fire Station

1 Outline of issue

Eastern Hill Fire Station is the MFB's no.1 fire station. It was built in the late 1970s and was due for a half-life refurbishment in the 1990s. A half life refurbishment is where the MFB seeks to bring a station's design and performance into line with the current design brief. The half-life refurbishment should occur 20 years after a fire station is built. The half-life refurbishment of Eastern Hill was put off for many years. In 2011, the MFB decided that the refurbishment had to be done due to the building's very poor condition and growing dissatisfaction of end-users. Accordingly, funding of $2.5 million was allocated to the project.[669]

In order for the refurbishment project to proceed, endorsement was required through the Consultative Committee and the RADAP committee. In turn, those committees will not endorse the refurbishment project unless end-users also agree with the proposed refurbishment.[670]

Originally, the group of relevant end-users approved the proposed refurbishment of Eastern Hill, however, with the passage of time a new cohort of end-users would not agree to the proposed refurbishment.[671] The disagreement arose around the design of locker arrangements.[672] The evidence of Mr Pearson was that no matter how small or insignificant an end-user's concern was, the project is held up until the concern is either rectified to accommodate the end-user's concern or the project falls over.[673] In this instance, as a consequence of there being no agreement, the refurbishment of Eastern Hill fire station did not proceed.[674]

2 Relevant provisions of the 2010 Agreement

Clause 90.1

The employer shall provide at each station / location such amenities as agreed between the union and employer to provide for the preparation and consumption of meals, refreshments, recreation, rest and recline.

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[669] Statement of Gregory Pearson (MFB-37) at [87] – [91]
[670] PN4859.; PN4866.
[671] PN4915.
[672] Statement of Gregory Pearson (MFB-37) at [95]
[673] Statement of Gregory Pearson (MFB-37) at [101]
[674] PN9417; Statement of Gregory Pearson (MFB-37) at [105]; note also the proposed refurbishment of the Ringwood fire station also did not proceed because agreement could not be reached - Statement of Gregory Pearson (MFB-37) at [107] – [124].

Clause 90.10.2

> *MFESB will use its best endeavours to modify existing stations so that they conform with the guidelines. Any modifications will be by agreement and will be completed during the life of the agreement.*

Clause 13 - Consultative process, in particular:

> *'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'*

3 **Position of MFB**

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Gregory Pearson (**MFB-37**) at [87] - [106];
- the reply witness statement of Gregory Pearson (**MFB-39**) at [5] – [12]; [43] – [58]; and
- Transcript PN4859- Transcript PN4870; Transcript PN4915 – Transcript PN4927 (Mr Pearson).

In 2011, the MFB decided that the refurbishment to the Eastern Hill fire station had to be done due to the building's very poor condition and growing dissatisfaction amongst end-users. Accordingly, funding of $2.5 million was allocated to the project.[675]

As a result of the requirements in the 2010 Agreement for there to be agreement between the UFU and the MFB as to any amenities and modifications to fire stations, project management principles were applied to establish four significant decision points or 'gateways' for agreement:

(i) Initial consultation about a proposed project

(ii) Sign off on a concept plan

(iii) Detailed design specifications/drawings

(iv) Occupation.[676]

At each of these four gateways, agreement is obtained from end users. Once sign off has been received from each of these end users at a gateway, RADAP will review and, if it approves, recommend the gateway back to the consultative committee for endorsement. The consultative committee will then review the recommendation and may either endorse or reject the gateway. The consultative committee will never endorse a gateway, or even consider it, if all signatories showing agreement have not been received.[677]

Although the initial proposal for the refurbishment of Eastern Hill Fire Station was agreed to by end users, through the passage of time, a different cohort of end users came and they disagreed with the design for the locker arrangements in bedrooms and the en-suite and toilets. Agreement

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[675] Statement of Gregory Pearson (MFB-37) at [87] – [91]
[676] Reply Statement of Gregory Pearson (MFB-39) at [5] – [12]
[677] Ibid.

with end-users could not be achieved. Accordingly, the project was referred to the consultative committee in May 2013 and was noted as formerly ceased.[678]

4 Position of UFU

Evidence dealing with the position of the UFU is set out in:

- the witness statement of Danny Ward (**UFU-19**) at [85] – [101]; and
- Transcript PN7463-Transcript PN7466 (Mr Hamilton); Transcript PN7975-Transcript PN7978, Transcript PN8325-8351 (Mr Ward).

The UFU acknowledge that this was a bad outcome: Mr Hamilton at Transcript PN7466 and Mr Ward at Transcript PN8350.

Under cross examination Mr Ward essentially accepted the factual basis for the failure of the Eastern Hill refurbishment project and that it was bad outcome – Transcript PN8343-8350:

> *But can you understand that it makes it unworkable to conduct a refurbishment project of this nature if once you get sign-off by the end users they change their mind and then sort of go back on their approval. Do you understand that that makes these projects almost impossible to implement?---I don't believe a lot of stations have come through this process and been developed and are fully operational now. I don't believe that people don't change. I mean, building a house, things change.*
>
> *Well, things do change. In your statement in paragraph 92 you say there's the employees, and I quote you in your statement 92, 'The employees were practically the only persons who would be affected by the refurbishment.' Well, that with respect is simply wrong, isn't it? I mean, at the end of the day, the people affected by the refurbishment are not only this group of employees but future employees, aren't they?---Yes, but people can only - the people that are stationed there at the minute. Surely they're the ones who can only comment. I can't comment, I'm not there. So it's got to be them that make the comment.*
>
> *Yes, existing firefighters in a station aren't going to have a particular concern about what's going to happen in five years' time, are they? They're going to be interested in the here and now?---Exactly.*
>
> *So their focus is on what suits them at a particular time, isn't it?---It's what best suits firefighters living away from home.*
>
> *Well, what I suggest to you is that this mechanism cuts out anyone considering the needs and interests of future firefighters, doesn't it?---You can only act on the people who are stationed there now.*
>
> *Yes, I understand that, and this all follows I think from the approach taken to clause 90.8, requiring agreement. This is one of the aspects of that, isn't it?---Yes.*
>
> *I think you're aware that ultimately the outcome was that the funding wasn't used, the deadline for agreement expired, and ultimately the refurbishment didn't take place, did it?---Yes.*

[678] Statement of Gregory Pearson (MFB-39) at [103]

Would you agree with me that this is a bad outcome?---I would agree that the station needs a refurbishment but it needs to be done right.

5 **Operation of the 2010 Agreement**

The effect of the operation of clauses 90.1, 90.10.2 and clause 13 of the 2010 Agreement is that, absent agreement of the UFU (and in practise its end user members) the MFB is unable to modify and refurbish a fire station.

6 **Effect of the issue**

The evidence from the UFU President, Mr Hamilton, was that it was not a good outcome that the refurbishment of Eastern Hill fire station did not proceed - Transcript PN7463-Transcript PN7466:

> *That's an example, isn't it? Also the Eastern Hill refurbishment. Without the okay of the end users that refurbishment didn't proceed, did it?---No, that never proceeded.*
>
> *Do you accept that those are bad outcomes overall for the MFB and firefighters, where a new station is not built or an existing station is not refurbished. They're not good outcomes, are they?---In particular it wasn't a good outcome for number 1, no.*
>
> *Not a good outcome – I'm sorry, I didn't catch - - -?---**It wasn't a good outcome for the firefighters at number 1**. As I understand it, the MFB ultimately withdrew the proposal because it wasn't supported.*

Although the MFB had set aside funding of $2.5 Million for the refurbishment of Eastern Hill, the requirement under the 2010 Agreement for the modifications to be agreed to by the UFU (and in practise its end-user members) meant that the MFB was unable to proceed with the project because agreement or consensus on the modifications was not reached with all end-users.

This had the effect that:

(a) the MFB was not able to refurbish the Eastern Hill fire station to conform with modern design principles.

(b) The Eastern Hill fire station remains in a state requiring refurbishment well past its half-life.

The situation is unworkable: see Transcript PN8343-Transcript PN8351.

Whilst firefighters at stations may have their own opinions which would ordinarily be taken into account in any consultation process,[679] it is a poor outcome for all concerned those opinions operate as a veto over MFB decisions to refurbish fire stations. That is the position as it stands under the current 2010 Agreement and it has proven to be unworkable.[680]

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[679] See, for example, reply statement of Greg Pearson (MFB-39) at [25], Rau at PN267

[680] Note also issues with Ringwood and Templestowe fire stations at [107] – [135] of the statement of Greg Pearson (MFB-37)

Appendix EE

Introduction of Workplace Policies and Guidelines

7 **Outline of issue**

In early 2012, the MFB drafted a suite of policies and guidance notes in relation to human resources matters such as sick leave, annual leave, payroll processing, higher duties and employee transfers (**Polices and Guidance Notes**) to address a lack of adequate equivalent documents.[681]

Implementation of the Policies and Guidance Notes was subject to the consultation process[682] and an initial report was put together for the Consultative Committee in November 2012.[683]

The UFU sought legal advice in relation to the Policies and Guidance Notes[684] and requested a range of further information from the MFB.[685] The MFB provided a number of versions of the Policies and Guidance Notes to assist the UFU to consider them and provide a response.[686] The UFU, after a number of months, stated that the Policies and Guidance Notes did not comply with the Agreements[687] and raised a grievance when this was rejected by the MFB[688].

The Policies and Guidance Notes were ultimately uploaded to the MFB intranet.[689]

8 **Relevant provisions of the 2010 Agreement**

Clause 15 - Introduction of change:

'Where the employer wishes to implement change in matters pertaining to the employment relationship in any of the workplaces covered by this agreement, the provisions of clause 13 will apply.'

Clause 13 - Consultative process, in particular:

'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'

Clause 19 – Dispute Resolution, in particular:

'19.4. While the above [dispute resolution] procedures are being followed, including the resolution of any dispute by FWA pursuant to clause 19.2.6, work must continue and the status quo must apply in accordance with the existing situation or practice that existed immediately prior to the subject matter of the grievance or dispute occurring. No party shall be prejudiced as to the final settlement by the continuance of work in accordance with this sub-clause.'

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[681] Statement of Michael Anthony Werle (MFB-35) at [13].
[682] Statement of Michael Anthony Werle (MFB-35) at [18].
[683] Statement of Michael Anthony Werle (MFB-35) at [21].
[684] Statement of Michael Anthony Werle (MFB-35) at [24] and [32].
[685] Statement of Michael Anthony Werle (MFB-35) at [34] and [45].
[686] Statement of Michael Anthony Werle (MFB-35) at [60].
[687] Statement of Michael Anthony Werle (MFB-35) at [65].
[688] Statement of Michael Anthony Werle (MFB-35) at [67].
[689] Statement of Michael Anthony Werle (MFB-35) at [78].

9 Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of Michael Anthony Werle (**MFB-35**) at [10]-[78]
- the reply witness statement of Michael Anthony Werle (**MFB-36**) at [7]-[22]; and
- Transcript PN4456 – Transcript PN4698 (Mr Werle).

The MFB's position was that the introduction of these policies was necessary because there is a lack of helpful policies and procedures on the intranet[690] and they are an important mechanism for proper administration within the organisation[691].

The MFB had been careful to ensure compliance with the Agreements.[692] As set out in Mr Werle's witness statement (**MFB-35**) at [18]:

> *Throughout the process of developing the Policies and Guidance Notes, I was very careful to avoid including anything that was inconsistent with the Agreements. I didn't want the UFU claiming that the MFB was seeking to change the intent of a clause or vary an agreement. I included a statement in the Policies and Guidance Notes to the effect that the guidance notes should be interpreted in conjunction with relevant enterprise agreements, administrative arrangements and policies applying to occupational groups.*

Mr Werle's evidence is that the process of consultation was delayed due to the UFU's failure to provide feedback in a reasonable amount of time despite numerous requests[693] and despite a number of attempts to engage with the UFU[694] and to date the Policies and Guidance Notes have not been put into practice.[695] As set out in Mr Werle's witness statement (**MFB-35**) at [134]:

> *It is very frustrating. We have worked hard to demonstrate that the Policies and Guidance Notes are consistent with the Agreements and they would be beneficial to the MFB and its employees. The UFU has not been forthcoming in the detail of its points of contention with the Policies and Guidance Notes. I have tried to draft them in language that people can understand and implement, without having to navigate other complicated documents like the Agreements. I would not have expected the process to be this difficult as the Policies and Guidance Notes reflect existing provisions. At the bottom of guidance notes we reiterate that the guidance note should be interpreted in conjunction with relevant enterprise agreements, administrative arrangements and policies applying to occupational groups.*

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[690] Statement of Michael Anthony Werle (MFB-35) at [11].
[691] Statement of Michael Anthony Werle (MFB-35) at [12].
[692] Statement of Michael Anthony Werle (MFB-35) at [18] and [49].
[693] Statement of Michael Anthony Werle (MFB-35) at [37]-[41].
[694] Transcript at PN4462.
[695] Statement of Michael Anthony Werle (MFB-35) at [133].

The MFB's position is that this issue is an example of the consultation process taking an inordinate amount of time and being used to *'block processes with which the UFU does not agree, regardless of the importance of the matter to the MFB'*.[696]

10 Position of UFU

Evidence dealing with the position of the UFU is set out in the witness statement of Dimitra Erini Sophia Krouskos (**UFU-25**) at [159]-[188].

The UFU's position is that the Policies and Guidance Notes were inconsistent with the Agreements. As set out in Ms Krouskos' witness statement (**UFU-25**) at [162] and [169]:

> *The Operations Agreement 2010, itself outlines relevant processes and procedures without the need for further documentation. The UFU was concerned that any additional documents would lead to an inconsistency in the way they were applied. Upon an analysis of the proposed Polices, it became evident that the documents lacked detail and contained many inconsistencies between the Agreements. ...*
>
> *These documents proposed to outline how terms and conditions of employees covered by the Agreements would apply in the workplace in a manner inconsistent with the Agreements.*

Ms Krouskos' evidence is that *'the MFB continuously refused to provide policies that were consistent with the Agreements'*[697] and that the dispute was lodged because *'the MFB had continuously failed to properly consult in regards to this matter'*.[698] As set out in Ms Krouskos' witness statement (UFU-25) at [188]:

> *The statement of Michael Werle that 'consultation is exhausted in relation to the Policies and Guidance Notes and is unlikely to achieve consensus' is incorrect. The UFU has on numerous occasions outlined that if the MFB simply tabled documents that were in accordance with the Enterprise Agreements and working conditions of employees contained therein, consensus would have been achieved. The MFB refused to provide documents that accurately reflected the current work practices and Agreements. The MFB wanted the UFU to provide an exhaustive list of all its concerns in writing. To do so would inevitably mean that the UFU would be undertaking a complete re-draft of the MFB's policies and guidance notes. It was for these reasons only that consensus had not been achieved to date and the reason for the UFU lodging a dispute in order to seek a quick resolution of this matter via the correct consultative mechanisms. Consultation was vital in this case not just because it was required under the Agreement but because these policies would have a real effect on employees' terms and conditions of employment and how they would be applied in the workplace.*

11 Operation of the 2010 Agreement

The effect of the operation of clauses 13 and 15 of the 2010 Agreement is that, without the agreement of the UFU, the MFB is unable to implement procedural mechanisms like internal

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[696] Statement of Michael Anthony Werle (MFB-35) at [132].
[697] Statement of Dimitra Erini Sophia Krouskos (UFU-25) at [185].
[698] Statement of Dimitra Erini Sophia Krouskos (UFU-25) at [187].

policies and guidance notes within a reasonable time of identifying that those mechanisms are necessary.

12 Effect of the issue

As a result of the delay associated with the consultation process and the lodging of a grievance (although the evidence differs in relation to which party contributed to the delay), the employees and managers were without the assistance of mechanisms by which to effectively administer terms and conditions of employment.[699]

The 2010 Agreement means that the MFB cannot implement measures even when they are procedural and designed to assist the effective operation of the Agreements. The fact that there were no formally documented policies and procedures in place had been noted in a Deloitte Audit Report.[700] The delays meant that the absence of these documents, once identified, could not be addressed in a reasonable amount of time.

This outcome is detrimental to the ability of the MFB to implement the procedures necessary for effective management of employees.

[699] Reply statement of Michael Anthony Werle (MFB-36) at [8].
[700] Witness statement of Michael Anthony Werle (MFB-35) at [25]-[26].

Appendix FF

Issue regarding new PPC – Lewis Report

1. Outline of issue

DCO Youssef in his first statement MFB-14 at [160]-[163] set out the issues as follows:

> *'In 2007 an inquiry was commenced by Judge Gordon Lewis into the circumstances surrounding the delays by the CFA and the MFB to replace the outdated protective clothing (PPC) of its firefighters. This resulted in the Lewis Report, a copy of which is now produced and shown to me and marked DAY-44.*
>
> *The Lewis Report noted the following:*
>
> *(a) The UFU refused to participate in the Inquiry.*
>
> *(b) The MFB had used its PPC at the time for the previous 20 years, during which time it monitored performance to ensure compliance with standards and quality procedures (p14);*
>
> *(c) In 2001 the existing MFB uniform supply contract was coming to an end, which provided impetus for the MFB to issue a Request for Tender (RFT) (p14);*
>
> *(d) PPC specifications were first developed by the MFB in 2000 (p15).*
>
> *(e) On 20 March 2001 a draft Australian Standard (AS4967) was released which specified minimum requirements and test methods for assessing PPC. The PPC then in use by the MFB and the CFA did not comply with the requirements of this Standard (p14);*
>
> *(f) Initial estimates in May 2002 were that the contract with the successful tender party would be in place by May 2003. While that estimate was ambitious considering interstate experience, at that time it would have been reasonable to expect the contract to be in place early in 2004 with the cooperation of all parties (p4).*
>
> *(g) In fact, a decision was not announced by the CFA and the MFB in relation to the new PPC until October 2007 (Appendix 1), being three and a half years after a decision could reasonably have been expected to be made.*
>
> *(h) The tendering process for the new PPC was intrinsically entwined with the MFB and CFA enterprise agreements, which required agreement with the UFU to be reached with the UFU on equipment to be worn and/or used by employees (p37);*
>
> *(i) As part of the negotiations for a new enterprise agreement, the UFU refused to participate in the MFB tendering process. It wasn't until the enterprise agreement was resolved that the UFU indicated it would participate in the Tender Evaluation Panel (p37).*
>
> *(j) By July 2006 with the tendering process stalled, the Department of Justice became actively involved in the resolution of the impasse. This*

led to the development of the "Way Forward" solution to select and purchase new PPC (p37).

(k) *The relationship between the UFU and the agencies was adversarial and characterised by personal conflict; intransigence; and a lack of trust, shared commitment or respect. The UFU contested every aspect of the evaluation and delayed the tendering process by adopting the following tactics:*

- *The use of industrial action and OH&S and EBA processes;*
- *Lack of attendance at meetings;*
- *Holding public rallies;*
- *The UFU media releases and bulletins issued to members at many points throughout the process, critical of the tendering process and senior management. Some of this bulletins instructed members not to participate in the process;*
- *The UFU approach to the Minister in 2004 requesting an investigation into the probity and behaviour of the MFB management, regarding the PPC project;*
- *The UFU banning its members from participating in field trials of PPC under the tender evaluation process (p39).*

My experience is that the UFU does whatever it needs to do to delay initiatives based on its own agenda. This includes the types of behaviours outlined in the Lewis report, including failing to attend meetings. These behaviours are still being exhibited today.

In light of the above, Judge Lewis recommended that all requirements for UFU agreement to any proposal by the MFB to implement change should be removed from the enterprise agreements of the CFA and the MFB. That is, consultation obligations should be just that, not a right of veto.'

2. Relevant provisions of the 2010 Agreement

Clause 88 – Uniforms and Equipment, in particular:

'88.1. The MFESB and UFU must agree on all aspects of the:

...

88.1.4. appliances;

to be used or worn by employees. 'All aspects' includes, without limitation, design and specifications. This applies to new and replacement items.'

Clause 13 - Consultative process, in particular:

'13.3.2. The Committee comprises equal numbers of management and employee representatives as determined by the respective parties, and decision-making will be by consensus.'

3. Position of MFB

Evidence dealing with the position of the MFB is set out in:

- the witness statement of David Youssef (**MFB-14**) at [160] - [163];
- Transcript PN1592-Transcript PN1613 (Mr Youssef).

4. Position of UFU

Evidence dealing with the position of the UFU is set out in:

- Transcript PN5825-Transcript PN5929 (Mr Brown)
- Transcript PN7678-Transcript PN7666 (Mr Hamilton).
- Transcript PN7820-Transcript PN7822 (Mr Angwin acknowledging he had not read the Lewis Report).
- Transcript PN7980-Transcript PN7981 (Mr Ward – he also had not read the Lewis Report).
- Transcript PN8497-Transcript PN8504 (Mr Cleary – he had not read the Lewis Report).
- Transcript PN10803 (Mr Bawden – he was not even aware of the Lewis Report).
- Transcript PN11948-Transcript PN12162 (Mr Taylor – the substantive criticisms in the Lewis Report relating to the UFU were put to Mr Taylor).

The UFU acknowledge that this was a bad outcome. They (both Mr Brown and UFU President, Mr Hamilton) also acknowledged that the MFB sought as part of its log of claims for the current enterprise agreement to remedy the UFU veto power, as recommended by Judge Lewis, but that that had been rejected/resisted by the UFU. At Transcript PN5918-Transcript PN5929 Mr Brown said in answer to questions from Mr Parry QC:

> *Well, Mr Brown, before that - before you say that, can you accept the judge's observation that there had been chaos and it was continuing?---I accept that's his understanding. That's his findings.*
>
> *Now, the consequence of that sorry saga is that over this period of 2000 to 2007, the position was that the - at the beginning, the MFB and the CFA wanted to introduce now clothing because they wanted to replace what was there at present because it was outdated, probably not serving the purpose it was designed for. Do you accept that?---It was structural. Structural ensemble.*
>
> *Yes?---Yes.*
>
> *The consequence of what occurred, as the judge has set out, was that there were an unsatisfactory situation of clothing continued for, as you, I think, have accepted, three or four years longer than it needed to?---Absolutely.*
>
> *That's a very undesirable state of affairs, isn't it?---Absolutely.*
>
> *You were involved, I think, for the UFU in bargaining in 2009. Do you recall the MFB serving a log of claims on the UFU with respect to operational firefighters?*

---Yes, I can recall that.

They wanted to remove this requirement that there be agreement with regard to appliances and clothing and other matters, didn't they, in that log of claims?

---Yes. Can I just make a response to - - -

Sorry, I'll just finish that off. The UFU didn't agree to that, did they?---The UFU and MFB agreed to it when signing the EB.

Not what I asked. I said the MFB made a claim for that and the UFU resisted it and resisted it strongly?---Resisted it as part of negotiations.

Right.

THE COMMISSIONER: Was that a strong resistance?---I can't recall whether it was a strong resistance. There was a number of claims that both parties negotiated on. I came in towards the end of the agreement when there was the chief fire officer, Mr Shane Wright and Kirsty Schroeder and there was myself, Casey, and a couple of others that actually went through the clauses. So I wasn't part of the initial rounds of discussion. Our job was to try and get agreement on these things. So we worked really hard and long hours to try and get this agreement to a satisfactory position, and we were very comfortable with - that we met those (indistinct) expectation. Commissioner, can I just make comment on the page 30 just briefly?

Briefly?---It says in here, 'Final results for (indistinct) testing are yet to be evaluated.' That's that flash over testing I was talking about. So this report was done before the results of those tests had come in. Or the statement here.

At Transcript PN7678-Transcript PN7666 Mr Hamilton said in answer to questions from Mr Parry QC:

Were you aware that soon after those incidents being suffered there was a report commissioned from a County Court judge, Judge Lewis?---Yes, I remember the report. There was a report, yes.

Did you read the report?---I don't think I've read the report.

So you'd been a member of the UFU branch committee of management since 2000. That's for the last 14 years. This report was commissioned following serious burns being inflicted on a firefighter and a minister of the Crown invoking a report from a judge concerning the reasons they there had been delays. Presumably you were aware of that process at the time being followed?---I'm aware of the report, yes.

Are you aware the UFU made no submissions to Judge Lewis?---I believe it was handled by our solicitors at the time.

Well, solicitors act on instructions. Were you involve din giving them instructions?---Personally, no.

You don't know the reasons why the UFU didn't participate in the inquiry?---No.

The report was handed down on 28 February 2008 and it made, in part, some fairly damning criticisms of the UFU and their involvement in the whole proposal of getting new clothing through. Are you aware of that?---It was personal protective clothing, yes.

I understand you haven't read the report. Is that your evidence?---No, I haven't read the report.

You haven't gone back as president now and looked at the report?---No.

It's fair to say, isn't it, that the union has basically ignored that report, hasn't it? ---I don't believe that's the case.

Well, you haven't read it?---I haven't.

You were on BCOM at the time. Do you know of any steps the union has taken that acknowledges the existence of the report and the concerns it raised?---It was handled by the secretary and our solicitors at the time.

So it was left to Mr Marshall and the solicitors?---Certainly the committee were briefed on the situation and the report.

They were damning criticisms. Were you aware of that, the union?---I just said I didn't read the report. I remember being briefed on the report.

Can I suggest to you the position is that your union has basically ignored that report. Correct?---I don't believe that's the case.

But you can't point to anything where they might have implemented or agreed or changed their processes in light of the findings in that report?---The UFU?

Yes?---I don't understand the question.

Can you point to one thing they've done that has changed in light of the findings of the judge in that report?---Well, we've agitated or we've always progressed trying to get the best PPE for our firefighters. That's what we did for our members.

That's not actually the question. The question was, you can't point to one thing that the union has done to implement or accept or acknowledge the findings of that report.

MR HARDING: Well, Commissioner, I object to the form of the question on the basis that the witness has said he hasn't read the report. Now, if Mr Parry wants to put to him a finding of Judge Lewis and say, 'What do you know about that,' then he should.

MR PARRY: No, I'm not - - -

THE COMMISSIONER: And the witness has replied in response to the question, 'Has the union ignored the report,' he hasn't accepted that proposition and then the following question from Mr Parry was, 'Can you point to one issue that the union has adopted,' and he has prevaricated in his answer and I'll allow the question.

MR PARRY: Do you understand the question, Mr Hamilton?---Could you repeat the question?

Whenever I do that I change the wording of it. You did not agree that the union has ignored the report. I suggest to you that you can't point to one thing the union has done to change its behaviour, acknowledge the criticisms or adopt a different approach in respect of the matters that are raised in that report?---Without having read the report, it's difficult to comment.

You know of nothing the union has done in light of that report to acknowledge it or implement it or improve its ways, do you?---Well, I am the president of the union. I believe that we do conduct ourselves in a professional manner, yes.

That's not the question. The question is, in light of the findings in the report you've done nothing, have you, to implement them, to acknowledge them, to deal with the issues that are raised therein?---I can't comment on the report. I haven't read the report.

You are aware that the MFB, following that report, sought to delete the clauses that required union agreement with regard to new PPE, are you aware of that?

---Excuse me, you'll have to repeat the question.

Yes. Bargaining commenced in 2008 - - -?---Yes.

- - - 2009, didn't it? And you were involved in that bargaining. And the MFB sought to delete those clauses that required union agreement in respect of new PPE?---Yes, I think that would be correct, yes.

And the union strongly resisted that?---Yes.

5. Operation of the 2010 Agreement

The effect of the operation of clauses 88 and clause 13 of the 2010 Agreement is that, absent agreement of the UFU the MFB is unable to make any decision to implement new or replacement PPC.

6. Effect of the issue

The requirement for UFU agreement is the subject of the Lewis Report. It is not intended to restate in this appendix.

The requirement for agreement over PPC in an enterprise agreement had the effect that -

(l) It contributed to the 'chaos' that surrounded the attempts by the MFB to tender for and obtain new PPC in the period 2000 to 2007.

(m) It was determined by Judge Lewis that any future enterprise agreement should contain a requirement for agreement between the MFB and UFU for PPC.

The UFU successfully resisted the attempt / log by the MFB to remove the UFU veto power from the agreement.

Whilst firefighters and the UFU will have their own opinions and contributions to make in any consultation that would ordinarily occur for new or replacement PPC, history has shown that a requirement for agreement over and above consultation gives rise to very poor outcomes for all concerned when the UFU's opinions operate as a veto over MFB decisions. That is the position as it stands under the current 2010 Agreement and it has resulted in many bad outcomes.

As My Taylor conceded at Transcript PN12158-Transcript PN12162:

That's a very, very bad outcome for firefighters, firstly, isn't it?---I wasn't referring to that, Mr Parry.

I am. It's a bad outcome for firefighters, isn't it?---The process – the quicker the process could've been expedited, the better.

It's a bad outcome for firefighters, wasn't it?---It was a bad outcome for everybody.

It was a bad outcome for the community as well, wasn't it?---Well, I can't reflect on it. Is it about outcome for the community? I don't know.

You're an emergency service worker and you're asking, 'Is it about outcomes for the community'?---I know it's a bad – it was a delayed outcome for firefighters because they didn't have protective clothing that met a standard for a lot longer than they should've had.